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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP.; TUG FORK LAND COMPANY; GEORGE KING; and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY BRIEF OF PETITIONER

RICHARD L. HORSTMAN
MARATHON OIL COMPANY
7301 NW Expressway
Oklahoma City, OK 73132

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

March 23, 1993

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE $10 MILLION PUNITIVE AWARD IS GROSSLY EXCESSIVE AND A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW	2
II. THE PROCEDURE IN THIS CASE VIOLATED TXO'S PROCEDURAL DUE PROCESS RIGHTS	15
CONCLUSION	20
APPENDIX A	1a
APPENDIX B	4a
APPENDIX C	10a
APPENDIX D	40a
APPENDIX E	44a

TABLE OF AUTHORITIES

CASES — Page

Allegheny Pittsburgh Coal Co. v. *County Comm'n*, 488 U.S. 336 (1989) 4
Browning-Ferris Indus., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 3
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985) 4
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) 4
Continental Eagle Corp. v. *Mokrzycki*, 611 So.2d 313 (Ala. 1992) 3
Coty v. *Ramsey Assocs., Inc.*, 546 A.2d 196 (Vt.), *cert. denied*, 487 U.S. 1236 (1988) 3
Daniels v. *Williams*, 474 U.S. 327 (1986) 2
Davis v. *Chesapeake & Ohio Ry.*, 56 S.E. 400 (W. Va. 1907) 3
Devlin v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Cal. Ct. App. 1984) 3
Dunn v. *United States*, 442 U.S. 100 (1979) 5
Ennis v. *Brawley*, 41 S.E.2d 680 (W. Va. 1946) 3
Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991) 6, 19
Gregory v. *Ashcroft*, 111 S. Ct. 2395 (1991) 4
Harmelin v. *Michigan*, 111 S. Ct. 2680 (1991) 5
Hinerman v. *Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992), *cert. denied*, 61 U.S.L.W. 3600 (U.S. 1993) 3, 18
Jackson v. *Virginia*, 443 U.S. 307 (1979) 2
Leach v. *Biscayne Oil & Gas Co.*, 289 S.E.2d 197 (W. Va. 1982) 3
Lisowski v. *Chenenoff*, 155 N.W.2d 619 (Wisc. 1968) 3
Moore's Inc. v. *Garcia*, 604 S.W.2d 261 (Tex. Civ. App. 1980) 3
Mutual Life Ins. Co. v. *Estate of Wesson*, 517 So.2d 521 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988) 3
Nordlinger v. *Hahn*, 112 S. Ct. 2326 (1992) 4
Pacific Mutual Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Pendleton v. *Norfolk & W. Ry.*, 95 S.E. 941 (W. Va. 1918) 3
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 19
Rookes v. *Barnard*, 1 All E.R. 367 (H.L. 1964) 4
Schad v. *Arizona*, 111 S. Ct. 2491 (1991) 2
United States v. *Williams*, 112 S. Ct. 1735 (1992) 15
Ex parte Virginia, 100 U.S. 339 (1879) 4
Waters-Pierce Oil Co. v. *Texas*, 212 U.S. 86 (1909) 2
Yee v. *City of Escondido*, 112 S. Ct. 1522 (1992) 15
Zazu Designs v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992) 14

OTHER AUTHORITIES

Coffee, *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981) 14
Eugene F. Brigham, *Financial Management: Theory and Practice* (3d ed. 1982) 11
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 19
Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931) 12
Restatement (Second) of the Law of Torts § 633 (1977) 20
Richard Neely, *The Product Liability Mess* (1988) 10
Sup. Ct. R. 14.1(a) 16

In its opening brief, TXO demonstrated that the $10 million punitive award in this slander of title case violates due process because it (1) eclipses by orders of magnitude any previous punitive award for similar conduct; (2) far exceeds any amount plausibly appropriate to further West Virginia's stated goals; and (3) was the product of passion and prejudice unconstrained by appropriate procedural safeguards.

Unable to defend the judgment on its own terms, respondents attempt to deal themselves a new hand. First, they ignore the controlling fact that this case was tried and decided *only* on a claim of slander of title. Respondents now attempt, through multiple mischaracterizations of the record, to persuade this Court that TXO was guilty of a wide variety of other misconduct, including fraud, subornation of perjury, and extortion. No such claims were presented to the jury for decision, and certainly none was proven.

Second, ignoring the limitations of record and presuming to set state policy, respondents for the first time combine a series of extra-record factual assumptions with their own economic theory to create a new "expected gain" justification for the $10 million award. No such theory was raised below, nor has anything remotely similar been endorsed by West Virginia. Moreover, the record evidence is insufficient to apply the theory here. Finally, respondents' new economic theory is flawed. Basing TXO's punishment on some measure of expected gain would lead only to arbitrary wealth redistribution; it would *not* further West Virginia's deterrence goal.

Third, respondents answer TXO's procedural arguments with misguided claims of "waiver," and with a misplaced charge that TXO seeks to elevate *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), to a rigid code of federal procedure for punitive damages. This strawman approach cannot disguise this fundamental fact: West Virginia's "really mean"/"really stupid" standard—which not even respondents defend—is a far cry from the multiple checks that in *Haslip*

ensured that "punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045.

I. TXO's substantive due process argument is firmly grounded in this Court's due process decisions. West Virginia, like other jurisdictions, imposes punitive damages for two reasons: to punish wrongdoers and to deter similar misconduct. Accordingly, the Due Process Clause guarantee against "'arbitrary action of government,'" *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (citation omitted), demands that punitive awards rationally further *those* government interests, and not merely redistribute wealth arbitrarily. If the challenged award is within the range of penalties that numerous courts and legislatures have deemed appropriate to punish and deter similar conduct, the jury's determination is entitled to great deference. See *Haslip*, 111 S. Ct. at 1045. If, however, the challenged award strays far beyond the bounds of contemporary and historical practice, serious doubts about the constitutional propriety of the award are raised, triggering meaningful means-ends review to ensure that the award is not "so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). *Cf. Jackson* v. *Virginia*, 443 U.S. 307, 314, 317 (1979).

TXO does *not* argue that the Constitution requires punitive damages to be limited to some fixed multiple of compensatory damages or by pre-existing punitive awards. Rather, TXO submits that the considered judgments of courts and legislatures are valuable objective indicia of whether an award rationally furthers legitimate state goals or is the impermissible product of passion and prejudice. This Court has recognized as much both in the punitive damages context, see *Haslip*, 111 S. Ct. at 1045-46 (approving Alabama's practice of "undertak[ing] a comparative analysis" of punitive awards), and more generally, see, *e.g.*, *Schad* v. *Arizona*, 111 S. Ct.

2491, 2501 (1991) (relying upon "history and widely shared practice").

Respondents' claim that common-law courts have never relied upon objective indicia is simply wrong. The tradition of comparing challenged punitive awards to previous awards for similar conduct is well established both in West Virginia [1] and in other States.[2] That comparison has included consideration of punitive-to-compensatory award ratios.[3] Similarly, courts frequently compare punitive awards to statutory fines for like conduct.[4]

TXO demonstrated that the $10 million award assessed here exceeds by orders of magnitude any previous penalty for similar conduct. Respondents cite no contrary evidence.[5] At a minimum, this history and wide practice

[1] *See, e.g., Hinerman* v. *Daily Gazette Co.*, 423 S.E.2d 560, 578 n.28 (W. Va. 1992), *cert. denied*, 61 U.S.L.W. 3606 (U.S. 1993); *Davis* v. *Chesapeake & Ohio Ry.*, 56 S.E. 466, 463 (W. Va. 1907).

[2] *See, e.g., Continental Eagle Corp.* v. *Mokrzycki*, 611 So.2d 313, 322 (Ala. 1992); *Coty* v. *Ramsey Assocs., Inc.*, 546 A.2d 196, 207 (Vt.), *cert. denied*, 487 U.S. 1236 (1988); *Mutual Life Ins. Co.* v. *Estate of Wesson*, 517 So.2d 521, 533 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988); *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204 (Cal. Ct. App. 1984); *Moore's, Inc.* v. *Garcia*, 604 S.W.2d 261, 266 (Tex. Civ. App. 1980); *Lisowski* v. *Chenenoff*, 155 N.W.2d 619, 632 (Wisc. 1968).

[3] *See, e.g., Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1045 (1991) (approving Alabama scheme that required that punitive damages bear an "understandable relationship to compensatory damages"); *Leach* v. *Biscayne Oil & Gas Co.*, 289 S.E.2d 197, 199-200 (W. Va. 1982); *Ennis* v. *Brawley*, 41 S.E.2d 680, 686 (W. Va. 1946).

[4] *See, e.g., Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part); *Pendleton* v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W. Va. 1918).

[5] Instead, respondents cite eighteenth-century English decisions approving "dramatic ratios" between puntive and compensatory awards. Resp. Br. 28. But those cases provide no support for an enormous punitive-to-compensatory ratio in this *slander of title* case since, as respondents concede, Resp. Br. 28 n.26, none of them had

provide a strong indication that TXO's punishment reflects passon and prejudice.

The issue is thus whether such an extraordinary penalty can be justified as furthering some legitimate state policy. Respondents concede that means-ends review is appropriate, but they urge the Court to apply the super-deferential standard used in reviewing legislative policy judgments on economic matters. The challenged award is so plainly excessive that it fails even that standard. But this case does *not* involve a considered legislative policy judgment. On the contrary, TXO's punishment was meted out by a single jury, and the democratic and institutional competency concerns that justify relaxed review of legislative judgments are therefore not present. Compare *Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992) (upholding a legislative policy judgment), with *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989) (striking down as irrational the aberrational *enforcement* of a similar legislative judgment). Here, this key institutional distinction is combined with abundant objective evidence that the challenged award is arbitrary, and not the rational application of state policy; therefore the case for rigorous review is clear. Compare *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985), with *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).[6] Cer-

anything to do with slander of title or remotely similar conduct. Moreover, those early decisions reveal much more about the historical unavailability of some types of compensatory damages than they do about punitive damages. *See, e.g., Rookes* v. *Barnard*, 1 All E.R. 367, 412 (H.L. 1964) (Lord Devlin).

[6] Constitutionally required means-ends review of this award raises no serious federalism concerns. "By its terms, the Fourteenth Amendment contemplates interference with state authority." *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2405 (1991). *See also Ex parte Virginia*, 100 U.S. 339, 345 (1879). The "interference" here is minimal. TXO does not suggest that the Due Process Clause sets any arbitrary caps on punitive damages. Rather, that Clause requires only that States ground their punitive awards in *some* legitimate theory, and that awards not exceed the outer limits imposed by reasonable application of the chosen theory.

tainly, due process requires more than the "means-ends" approach adopted by the court below, *viz.*, if you were "really mean," then that "ends" the due process inquiry.

A. TXO's punishment cannot be justified as reasonably furthering West Virginia's retributive theory, which embodies the universally recognized principle of proportionality between punishment and crime.[7] Although the proportionality principle does not admit of bright-line distinctions, even the most deferential review reveals that this award turns that principle on its head. TXO's punishment is 20 times higher than any ever before upheld in West Virginia in *any* type of case (and 10 to 100 times larger than the largest penalties for slander of title imposed elsewhere). Slander of title, a tort which threatens only financial harm, cannot plausibly be 20 times more "reprehensible" than any other tortious conduct.

1. Respondents "avoid" this problem by abandoning the claim they brought against TXO in favor of a fictional story of extortion, fraud, and subornation of perjury. But the jury determined *only* that TXO recorded a quit-claim deed in reckless disregard of its truth or falsity.[8] Whatever the merit of this finding, one thing is plain: no other misconduct was presented to the jury for decision. Obviously, a punitive award assessed in a slander of title case cannot years later be rationalized as punishment for uncharged (and dissimilar) acts.[9]

[7] Regardless whether the Fourteenth Amendment embodies the proportionality principle, *see Harmelin* v. *Michigan*, 111 S. Ct. 2680 (1991) (opinion of Scalia, J.), where a State justifies its punitive awards on that principle, the Due Process Clause requires that the State rationally apply its chosen theory.

[8] Although respondents repeatedly stress the intentional nature of slander of title, the jury was instructed that the standard in West Virginia is recklessness. *See* J.A. 23-24. In concluding that "the jury found the requisite malice," Pet. App. 19a, the decision below fails to note that the "requisite malice" was defined to include "reckless disregard of the other parties' rights." *See* J.A. 28-29.

[9] *Cf. Dunn* v. *United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indict-

It was no accident that respondents sought to recover from TXO only for slander of title: no fraud, extortion or subornation of perjury occurred. Indeed, having initially charged TXO with fraud, respondents *abandoned* that claim at trial.[10] Respondents as plaintiffs below *did not even request an instruction on fraud.* And the new allegations of "extortion" are "supported" solely by vague reference to two "threatening" letters. These letters (reproduced as App. A and App. B, *infra*)[11] demonstrate only that TXO informed respondents of the title problem and attempted to resolve the matter equitably. Finally, the claimed "subornation of perjury" rests on the erroneous premise that TXO knowingly sought a false affidavit, when, in fact, the record demonstrates that there was *no* inconsistency between the proposed affidavit and any previous statements of the affiant.[12]

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ment nor presented to a jury at trial offends the most basic notions of due process").

[10] Moreover, even if TXO had committed the acts fabricated in respondents' brief, respondents plainly suffered *no* compensable injury from any of those acts. And it is settled in West Virginia that punitive damages are prohibited in cases where no compensatory damages are awarded. *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). If West Virginia would not permit punitive damages if TXO *were* adjudged liable for this fictional misconduct, the State plainly has no interest in punishing TXO in the absence of a finding of liability.

[11] These appendices, as well as appendices C, D, and E to this brief, contain only record evidence.

[12] TXO's only previous contact with the putative affiant was a phone call in which he stated he "thought" he had purchased only coal rights from respondents. Tr. 1645. The affidavit stated merely that "there was no *specific agreement* on the part of myself or Tug Fork Land Company as to whether or not the oil and gas were to be reserved by Tug Fork Land Company in the attached deed." Tr. 1780 (emphasis added). TXO employee Wood testified that he wanted the affidavit signed only "if it was correct." Tr. 603-07. No contrary evidence was introduced. Respondents attempt to overcome these factual hurdles by repeatedly quoting their own counsel's questions as substitutes for the witness' testimony. *Compare* Resp. Br. 7 *with* Tr. 596; Resp. Br. 8 *with* Tr. 597.

2. The *only* relevant act in this case is the deed recordation that the jury found slandered respondents' title. And the record clearly shows that this sole act, even if tortious, was not so egregious as to justify a punitive award 526 times the compensatory award. Before drilling a well, TXO requested a title opinion from Larry Skeen, chairman of the mineral law committee of the state bar, author of *West Virginia Oil & Gas Law* (Michie 1984), and former West Virginia Assistant Attorney General in charge of natural resources. Skeen & Skeen's title opinion (which respondents never challenged as lacking independent professional judgment) concluded: "[I]t is our opinion that Virginia Crews Coal Company has a better title to the oil and natural gas under the subject realty . . . than [do respondents]." App. C, *infra*, at 37a. See also App. D, *infra*.[13]

As the West Virginia Supreme Court recognized, *any* cloud on title is a serious matter in the oil and gas business:

> No one disputes that before beginning to drill, any reasonable businessman would want to clear up any clouds on the title to the oil and gas rights, no matter how small. Therefore, we understand that before investing hundreds of thousands of dollars in an exploratory well on the Blevins Tract, TXO would

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[13] Skeen & Skeen relied upon two facts: (1) In 1958 respondent Tug Fork granted to Leo Signaigo "all the coal *and other minerals* and mineral substances" underlying the Blevins tract. Pet. App. 43a (emphasis added). Later provisions appeared to reserve *some* oil and gas rights to Tug Fork, but inartful drafting left it unclear whether Tug Fork had reserved *all* the oil and gas or only that portion associated with a particular coal seam. *See* Pet. App. 46a, 49a (¶¶ 2, 6 of the 1958 Deed). (2) After 1958 respondents did not have *any* interest in the oil, gas or coal assessed for taxes as required of West Virginia property owners; instead, Signaigo and his successors paid those taxes. The Skeens deemed this an "important indicia of ownership." App. C, *infra*, at 35a. Together, these circumstances created what title attorney Robert J. Wallace, trustee of the Eastern Mineral Law Foundation and a former West Virginia State Bar President, later characterized as "a most serious title defect or cloud on title. If abstracting this title I would not certify the title." App. E, *infra*, at 46a.

> have wanted to fork out $6,000 for an insurance policy against litigation in the form of a quit-claim deed.

Pet. App. 12a. That, of course, is exactly what TXO did —relying on the advice of counsel,[14] it obtained and recorded a quit-claim deed. *This* is the "heinous conduct," see Resp. Br. 1, for which TXO was found liable.

Respondents claim that although this slander of title appears innocuous and caused no harm, it "threatened 'millions of dollars' in harm." Resp. Br. 1 (quoting Pet. App. 40a). On the contrary, TXO's *slander of title* threatened *no* harm to respondents. Slander of title focuses on the harm to a property owner caused by a decline in property value. See Pet. App. 17a. No such decline occurred (the jury awarded only attorneys' fees) or was threatened here, because TXO cleared any cloud on title resulting from its "slander" through its declaratory judgment action. TXO could have eliminated respondents' royalties only by judicial declaration that TXO, not respondents, held title to the Blevins tract oil and gas. In that event, however, there would be no basis for *any* damages, because respondents' (nonexistent) title obviously could not have been slandered. There was no near miss by "harmful acid," Resp. Br. 1-2; rather, this case is about a direct hit on the "deep pocket" of an out-of-state defendant.[15] See *Haslip*, 111 S. Ct. at 1045.

3. How then did a jury reach the conclusion that TXO should pay $10 million for "reckless deed recordation?" Two factors ensured that the verdict would be the unconstitutional product of passion and prejudice. First, over TXO's repeated objection, respondents showed the jury

[14] Respondents misleadingly claim that the testimony of TXO employee Mike Good suggests that TXO knew its counsel's advice to be wrong. Good testified that although in his "layman's opinion" Tug Fork probably had good title, he was "not an attorney" and therefore had to rely on advice of counsel. Tr. 657.

[15] Moreover, there was no threat of multi-million-dollar harm even accepting respondents' fictional account of TXO's misconduct. *See infra* pp. 10-12.

videotaped depositions of out-of-state attorneys who testified regarding their opinions as to *alleged* conduct by TXO in other States. *None* of this largely hearsay testimony had anything to do with this case or slander of title.[16] Typical of this "evidence" was the testimony of Allen Devore, an Oklahoma attorney, who testified regarding "the *Freede* case." Mr. Devore, who was neither witness, nor party, nor record counsel in the *Freede* case, based his opinions solely upon his review of court papers *the morning of his deposition.* Tr. 313-19. Yet he unabashedly told the jury that "TXO has violated the rights of Dr. Freede and hundreds or thousands of other people across the nation." Tr. 315. Subsequent to the West Virginia trial, TXO *won* the *Freede* case in a jury trial. See Pet. App. 24a.[17] The presentation of such "evidence" allowed the jury to conclude that it sat as a national tribunal with a mandate to punish this out-of-state corporation for any and all "bad acts."

Second, on the critical question of how to calculate an appropriate punitive award, the jury was given near-absolute discretion and *no* guidance on how to exercise that discretion to further state policy. To make matters worse, the *only* concrete advice given the jury was that its award should reflect TXO's status as a wealthy out-of-state corporation.[18] This obsessive focus on wealth obviously invited the jury to redistribute wealth.

[16] It is bad enough that some of this "evidence" was admitted at trial. Respondents go even further in their attempts to portray TXO negatively, and cite portions of the testimony that even the trial court judge rejected. *Compare* Resp. Br. 14 (citing Tr. 202, 274-75) *with* Tr. 186, 257.

[17] The out-of-state attorneys reviewed allegations made in five cases. Three had been settled without any admission of liability (Tr. 197, 225, 250, 276) and the other two were still pending (Tr. 303, 312). Although the *Freede* case was the only case actually tried, the court below dismissed TXO's victory, commenting that "even a blind hog finds an acorn now and again." Pet. App. 28a n.9.

[18] *See, e.g.*, J.A. 34 (jury instruction) ("In assessing punitive damages, if any, you should take into consideration . . . the wealth of the perpetrator"); Tr. 782 (respondents' closing argument) ("You can fine TXO one percent [of its wealth] if you want. . . .").

Respondents contend that these errors were harmless, because the award was given "searching review" by a judge respondents characterize as "an outspoken critic of punitive damages." Resp. Br. 15 (emphasis omitted). This attempt to justify affirmance by characterizing the opinion writer's views seems odd. But if it is proper, TXO submits that Justice Neely's self-description is more revealing:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me.

Richard Neely, *The Product Liability Mess* 4 (1988).[19]

B. Nor can TXO's punishment be justified on deterrence grounds. Respondents argue that $10 million is justified because TXO expected to "misappropriate a stream of royalties worth between $5.0 million and $8.3 million." Resp. Br. 1. There are a number of fatal defects in this theory. First, respondents' "expected gain" theory is manufactured for the first time in their brief to this Court. No such theory was presented to the jury, the trial judge, or the West Virginia Supreme Court. Nor did that court mention respondents' theory as a basis for upholding the challenged award. Indeed, the West Virginia Supreme Court has *never* held that basing punitive awards on some *post hoc* measure of "expected gain" promotes West Virginia policy.[20]

Second, there is no way to establish *on this record* that respondents' theory supports the $10 million award. Because the argument was not raised below, neither side introduced evidence to prove TXO's expected gain. Only now do respondents proclaim that three figures included in documents and testimony introduced for other purposes are all that is necessary to infer that TXO expected to gain $5 million.

[19] *See also* Richard Neely, *The Product Liability Mess* 1 (1988) ("As a state court judge, much of my time is devoted to designing elaborate new ways to make business pay for everyone else's bad luck").

[20] In its exhaustive treatment of punitive damages in the *Garnes* case, for example, which established a whole series of permissible considerations, "expected gain" was never mentioned.

Oil and gas economics are hardly that simple. Respondents' eleventh-hour calculation of expected gain rests upon a series of assumed facts that appear nowhere in the record. Those extra-record factual assumptions illustrate the danger of the appellate fact-finding respondents urge —even a cursory examination demonstrates that respondents' thumbnail estimate is off by orders of magnitude. Respondents assume, *inter alia*, that: (1) TXO had a 100 percent chance of *eliminating* all royalties;[21] (2) TXO would own 100 percent of the (slandered) Blevins tract;[22] (3) the initial well and each of 14 possible successive wells had a 100 percent chance of success;[23] (4) TXO would receive all oil and gas revenues instantaneously;[24] and (5) TXO would pay *no* taxes.[25] Thus, it is plain that the record does not contain sufficient information to determine what TXO's expected gain might have

[21] But under respondents' own theory, TXO expected to *reduce*, not eliminate royalties. See Resp. Br. 10; Pet. App. 7a.

[22] An unrelated entity, the APCOT-FINADEL Joint Venture, had rights to 25 percent of TXO's interest (and therefore 25 percent of any gain from slander of title). *See* Tr. 685.

[23] Had the issue been raised, TXO could have demonstrated that oil and gas drilling is quite risky. As with any well, there was a significant risk that the wells would be dry or not as successful as hoped. (Indeed, that is exactly what happened.)

[24] In fact, revenues from a successful well would have been stretched out over at least 20 years. Tr. 97. At a reasonable oil and gas discount rate of 15 percent, a dollar received in 20 years is worth only *6 cents* today. *See* Eugene F. Brigham, *Financial Management: Theory and Practice* 837 (3d ed. 1982).

[25] If the expected gain issue had been raised, TXO could have demonstrated that any proceeds would have been subject to property, severance, and income taxes, which would substantially reduce any expected gain (possibly by 50% or more).

been and certainly not enough to support a $10 million penalty.[26]

Third, respondents' "expected gain" theory, adopted wholesale from the brief of the West Virginia Trial Lawyers ("Trial Lawyers"), is simply wrong. Respondents' premise is that the *expected* legal sanction associated with committing a tort should be equal to the expected gain, thereby causing potential tortfeasors to perceive the activity as unprofitable. TXO agrees. Respondents err, however, in assuming that the *actual* legal sanction must be set at the expected gain. A potential tortfeasor's *expected* legal sanction turns on the *rule* of punitive damages that can be inferred from prior cases, not the absolute amount of the award in a particular case.[27]

This distinction is particularly important in the context of slander of title. The scheme that respondents attribute to TXO—falsely claiming title to property in an attempt to induce ownership concessions—is one in which the slanderer's expected gain is *exactly equivalent* to the expected harm to his victim. Every dollar gained by the slanderer (by virtue of his increased ownership interest) is necessarily a dollar lost by the victim.[28]

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[26] If respondents *had* sought to justify an award on this theory they would, of course, have faced significant hurdles in proving the relevance of expected gain and in establishing as a factual matter that TXO's expected gain was anywhere close to the fabricated figures they bandy about in this Court. There is certainly no basis for this Court to divest state juries and courts of their proper roles in this fact-finding process.

[27] Professor Morris recognized this 60 years ago. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1184 (1931) ("even though he is treated leniently in a particular case, he is made to realize the risk of forbidden conduct, and the knowledge of risk will discourage similar misconduct, even though the particular judgment happens to be small").

[28] The Trial Lawyers stress that undeterred torts can cause social harm beyond the harm to the victim—*e.g.*, oil and gas production could be retarded if slander of title left owners uncertain about rights of ownership. Although undoubtedly true, that observation merely supports *some* award of punitive damages (*i.e.*, the amount necessary to deter the wrongful conduct); it is irrelevant to the question what *amount* of punitive damages is necessary to achieve that goal.

Thus, punishing all such schemes with awards of full compensatory damages would completely deter such misconduct, because the *expected* legal sanction—damages sufficient to compensate the victim for this expected injury—is exactly equivalent to the expected gain. The Trial Lawyers posit a scheme that (whether successful or not) will be punished half of the time. Since only *half* of such schemes are detected and punished, the total award must be *twice* what would be awarded if all such schemes were detected and punished. Applying those assumptions (and rational deterrence theory) here yields a punitive award of $19,000 (in addition to the $19,000 compensatory award). Because of the rule it embodies —*i.e.*, the penalty for such conduct is twice the harm caused—that $38,000 award will deter all similar schemes *no matter how large the expected payoff*.[29]

Thus, if slandering title to obtain ownership concessions goes unpunished half of the time, assessing TXO with a punitive award of $19,000 (and a total award of $38,000) would fully serve West Virginia's deterrence goal.[30] The enormous excess actually awarded can only

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[29] For example, the Trial Lawyers posit a later scheme with a potential payoff of $10 million. With a 50 percent chance of success, one contemplating this scheme expects to gain $5 million. However, he must balance this expected gain against the expected legal sanction. (Because there is a 50% chance that his scheme will cause no harm (unsuccessful) and a 50% chance that it will cause $10 million in harm (successful), the *expected* harm is $5 million.) A damage award (compensatory plus punitive) of twice that expected harm is $10 million, which when multiplied by the 50 percent chance of being caught and punished, yields an expected legal sanction of $5 million. The expected legal sanction equals the expected gain, there is no profit in the scheme, and the slander is deterred.

[30] This is not to say that expected gain is never relevant. For some torts, product liability, for example, expected gain may bear little relation to expected harm. Accordingly, it is possible in that

deter legitimate business conduct contrary to West Virginia policy,[31] and is nothing more than arbitrary redistribution of wealth.[32]

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context that a legal sanction based upon actual harm (and the risk of escaping punishment) would not deter the activity.

[31] Respondents claim that because slander of title is an *intentional* tort, the Court should not be concerned that the punitive award far exceeds the amount necessary to meet state goals. However, intentionally recording a deed is "bad" only if the deed is false. Falseness is established after the fact, and in West Virginia, reckless disregard of the truth will suffice. Accordingly, the risk of overdeterrence is real, and as the decision below recognized, "we do not want to discourage people from making legitimate (through possibly weak) claims [to property]." Pet. App. 15a.

[32] Respondents also argue that the $10 million award is reasonable "in light of [TXO's] wealth." Resp. Br. 24. This Court has already cautioned against overreliance on this prejudicial factor, *see Haslip*, 111 S. Ct. at 1045, and where, as here, the defendant is a corporation, the entire premise of any wealth-based deterrence argument—*i.e.*, that the wealthy place a lower value on marginal income—is missing. Corporations are not "wealthy;" they are owned by investors who are frequently of average wealth. *See, e.g., Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992).

Recognizing this weakness, respondents' amici favor a "size" argument—they contend that a $10 million award is reasonable because TXO is "large," and only an enormous penalty will get the attention of senior management. It is wholly irrational, however, to assume that the only people with incentives to reduce corporate losses are senior management. Large modern corporations like TXO are organized in operationally autonomous divisions with middle managers evaluated on the basis of profits, ability, and the success of their individual divisions. *See* Coffee, *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 397 (1981). Thus, managers at such corporations tend to be as cost-conscious as managers at smaller companies. It is no surprise, therefore, that TXO's West Virginia managers went to great lengths to negotiate a few thousand dollars from the price of the quit-claim deed. *See* App. B, *infra*, at 7a. It is absurd to presume that these same managers could not be motivated by a moderate, but not trivial, punitive award. Neither TXO's wealth nor its size provides any rational basis for increasing the penalty a *hundred-fold* over the amount that would be necessary to deter "Jeff's Neighborhood Hotdog Stand." *See* Pet. App. 39a.

In sum, the extraordinary penalty assessed against TXO cannot plausibly be justified as necessary to further any legitimate state goal. *See, e.g., Haslip*, 111 S. Ct. at 1045 (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition"); Br. of Public Citizen 12 ("a punitive award that clearly exceeds any amount needed to further deterrence or retribution crosses the constitutional line").

II. Respondents' procedural attacks also miss the mark: plainly, the prejudicial and vague jury instructions, the lack of any trial-court review on the record, and the application by the court below of its "really mean"/"really stupid" test together resulted in a serious deprivation of TXO's procedural due process rights.

A. Aside from their frivolous waiver arguments,[33] respondents argue primarily that reversing the punitive award in this case on due process grounds would require States to guarantee appellate review in civil cases and to adopt particular, rigid procedures. *See* Resp. Br. 43-44 & n.52. TXO seeks no such result. In *Haslip*, this Court concluded that the jury instructions and two levels of careful review together provided procedural checks that ensured that "punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory dam-

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[33] On appeal to the West Virginia Supreme Court, TXO argued that "the factors considered by the jury and the trial judge . . . . do not meet the [*Garnes*] or *Haslip* standards and are not constitutionally permissible." W.V. App. Br. 48. The West Virginia court recognized that TXO's challenge was based on both procedural and substantive due process grounds. Pet. App. 35a. TXO's argument was thus both pressed and passed upon below, and is therefore properly before this Court. *United States* v. *Williams*, 112 S. Ct. 1735, 1738-39 (1992). That TXO's arguments in support of its properly presented due process challenge are not identical in some instances to those it made below does not alter this conclusion. It is well established that "[o]nce a federal claim is properly preserved, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532 (1992).

ages." 111 S. Ct. at 1045. Here, by contrast, the $10 million award was made pursuant to jury instructions that invited an arbitrary award, and then was subjected to no real review once the West Virginia Supreme Court declared that TXO had been "really mean." A determination that such a procedural vacuum is constitutionally inadequate would in no way interfere with any State's effort to implement a fundamentally fair punitive damages system.

B. Respondents defend the jury instructions by claiming that TXO received "more procedural protections" than were present in *Haslip*,[34] Resp. Br. 35, apparently assuming that due process requires an appellate court merely to tally the number of jury instructions and compare that number to the *Haslip* benchmark. As TXO discussed in its opening brief, while the jury here may have received more discrete bits of information than did the *Haslip* jury, the additional "information," far from properly guiding the jury's discretion, served only to stir passion and prejudice.[35]

Respondents portray TXO as urging that the wealth of a defendant can *never* be considered in the context of punitive damages, and they warn the Court against adopting such a "rigid constitutional rule." Resp. Br. 38. TXO advocates no such rule. Rather, TXO submits that

[34] The question whether the jury instructions comported with due process is plainly encompased within the question "[w]hether the award of punitive damages against [it] made in the absence of the procedural safeguards approved by this Court in [*Haslip*] violated TXO's procedural due process rights," Pet. i, and is therefore properly before this Court. Sup. Ct. R. 14.1(a).

[35] Respondents admit that phrases such as "'the character and degree of the wrong'" and a direction that punitive damages are "'entirely discretionary with the jury'" are "ambiguities" that can be "troubling." Resp. Br. 35 (quoting *Haslip*). Yet the jury below was instructed in functionally indistinguishable terms to award punitive damages as "additional compensation," to consider "the nature of the wrongdoing." J.A. 34, and was charged that it was "your decision, to either find punitive damages or not to find punitive damages." J.A. 41.

(1) consideration of wealth in this case did not rationally further West Virginia's stated policies, and (2) because the jurors were told that they should award some "additional compensation" and were also given numerical referents that related only to TXO's size, the jury naturally was led to act on passion and prejudice.[36]

Finally, the jury instructions did not, as respondents claim, confine the "additional compensation" component to an amount "needed to remedy injuries caused by TXO." Resp. Br. 41 n.47 (emphasis omitted); see J.A. 34. Plainly, if it had been so limited, then the award could not possibly have been even one dollar: the jury found *no injuries caused by TXO* other than respondents' attorneys' fees, for which a compensatory award of $19,000 was entered.[37]

C. It is also patent that the trial court conducted no careful, recorded review such as that approved in *Haslip*. The record of the post-verdict hearing includes only the lawyer's arguments; obviously, the trial judge's statement that he had "read everything," Pet. App. 56a,

[36] Respondents insist that the jury instructions confined the "wealth" evidence to a deterrence function. This is false. The jury was told that punitive damages had *two* functions: "to serve as an example or warning to others . . . and to provide additional compensation . . . ." J.A. 34. Thus, the jury had no reason to believe that the punitive award should serve *only* to deter. Particularly viewed in light of the instruction to award "additional compensation," the net worth evidence presented by respondents was the only guidance in calculating that bonus compensation.

[37] Denying that TXO's status as an out-of-state corporation could have affected the jury's calculation of the "additional compensation," respondents note that one of the parties adverse to TXO was itself a Texas corporation. Resp. Br. 41. This emphasis on Alliance Resources as the "principal litigant[]" in this case is misleading. West Virginia residents, Tug Fork, King, and Goode owned the oil and gas mineral interest and 85% of the royalty interest. *See* Pet. App. 8a. Moreover, an appeal to animus against an out-of-state corporation clearly was made at trial; counsel for respondents described TXO to the jury as "this greedy bunch from down in Texas," Tr. 773, and "Texas high rollers, wildcatters." Tr. 777.

was not reasoning that could later be reviewed. And the record contains not a shred of support for respondents' wishful claim that the trial court "revealed [as] the basis for its decision" that "TXO had embarked on a deliberate corporate scheme of land fraud and deception, which its highest officials knew to be wrong." Resp. Br. 42.[38]

D. Respondents also contend that the West Virginia Supreme Court's perfunctory review and its application of the "really mean"/"really stupid" test were adequate to satisfy due process. Respondents try to pass off the "really mean"/"really stupid" test as mere *dictum* and dramatic flourish. Resp. Br. 46 & n.57. They ignore that this test *has been applied* in a subsequent decision. See *Hinerman* v. *Daily Gazette Co.*, 423 S.E.2d 560 (W. Va. 1992). Finally, there is no suggestion in the court's discussion of its newly minted test that there is *any* constitutional limit to punitive awards against defendants deemed "really mean."[39]

The West Virginia Supreme Court did not scrutinize the jury instructions, nor did the record permit it to review the trial court's post-verdict decision. The

[38] Respondents also assert that the West Virginia Supreme Court's examination "cured" any error at the trial and post-trial levels. Resp. Br. 44. Even if that review had been "searching," respondents miss the point that in *Haslip*, this Court found important the *several layers* of protections provided in Alabama. At a minimum the jury must have been asked first to consider the same standards applied by the reviewing court. The appellate court focused principally on whether TXO was "really mean" or "really stupid," without any analysis of the procedure afforded TXO at the earlier stages. This review was too insubstantial to carry the procedural weight of multi-level review.

[39] The cases respondents cite to demonstrate that "[t]he West Virginia Supreme Court has proved itself more than willing to reduce or eliminate excessive damages" are unhelpful. Resp. Br. 46 n.55. In the first place, *not one* of those cases was reviewed under the "really mean"/"really stupid" test. And in five of the seven cases, the punitive awards were reversed entirely—and unremarkably—on the basis of insufficient evidence. Finally, one of the cases did not even involve punitive damages.

"comparative analysis" conducted by the West Virginia Supreme Court, see Resp. Br. 46 n.54, was not a comparison of prior awards *for similar conduct*, as approved in *Haslip*. Rather, the court surveyed post-*Haslip* punitive damages awards made for a wide variety of dissimilar conduct, including wrongful death, product liability, and bad-faith conduct by insurers. See Pet. App. 51a-52a. The result of this exercise was the "really mean"/"really stupid" standard. West Virginia thus abandoned the meaningful procedural scheme that, "following the dictates of *Haslip*," it had recently established.[40] *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). Whereas in *Garnes* the court recognized that due process demands a "reasonable relationship . . . to the harm that has actually occurred . . . . [and to] compensatory damages," Pet. App. 33a-34a (quoting *Garnes*), the decision below established that any such inquiry ceases once the actor is pronounced "really mean."[41]

E. The core concerns of the vagueness doctrine are plainly raised by this case.[42] Although this Court found

[40] Even if limiting due process review with respect to *some* broad category of conduct were appropriate, the classification here is clearly arbitrary. Indeed, the court admitted that "it is sometimes difficult to distinguish between the mean cases and the stupid cases" at the appellate level. Pet. App. 36a n.11. And two concurring justices forcefully noted their concern over the lack of guidance provided by these terms. Pet. App. 53a-54a.

[41] TXO does not, as respondents claim, suggest here that West Virginia was required to apply its *Garnes* decision retroactively. Rather, TXO challenges the constitutional sufficiency of the procedure it did receive, just as it did in its appeal in West Virginia, W.V. App. Br. 47, and in its Petition for a Writ of Certiorari. Pet. 9-11.

[42] Respondents argue that TXO waived its vagueness argument, implicitly assuming that the vagueness doctrine embodies a constitutional principle separate from due process. But it is well established that the vagueness doctrine arises out of and expresses concerns inherent in the Due Process Clause. *See, e.g., Roberts* v. *United States Jaycees*, 468 U.S. 609, 629 (1984); Laurence H.

the vagueness doctrine "not helpful" in *Haslip*, 111 S. Ct. at 1046 n.12, the circumstances here compel the conclusion that TXO simply had no notice of the elements of a tort not previously recognized in West Virginia [43] or of the basis on which it could be assessed a punitive award of $10 million for its conduct. Even worse, respondents now urge this Court to uphold that enormous penalty on the basis of uncharged and unproven torts and crimes against which TXO never has had a chance to defend itself. If notice plays any role under the Due Process Clause, the jury verdict in this case must be set aside.

CONCLUSION

For the foregoing reasons, and those stated in TXO's opening brief, the judgment of the West Virginia Supreme Court of Appeals should be reversed.

Respectfully submitted,

RICHARD L. HORSTMAN
MARATHON OIL COMPANY
7301 NW Expressway
Oklahoma City, OK 73132

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

March 23, 1993

* Counsel of Record

Tribe, *American Constitutional Law* 684 (2d ed. 1988). As discussed above, all procedural due process arguments were properly preserved. *See supra* note 33.

[43] Ignoring established slander of title law in other jurisdictions, the court found liability in the absence of any decline in property value, and permitted punitive damages without a finding of *actual malice*. *See* W.V. App. Br. 34. (Contrary to respondents' claims, attorney's fees constitute special damages only where the action in which they are incurred is the direct result of the influence of publication on third parties. Restatement (Second) of the Law of Torts § 633 at 359 (1977) (comment on clause (1)(b))).

APPENDICES

APPENDIX A

PLAINTIFF'S EXHIBIT NO. 4

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Main Street
Ripley, West Virginia 25271-0066

July 12, 1985

Alliance Resources Corporation
N. Dallas Bank Tower
Suite 100
12900 Preston Road
Dallas, Texas 75230

Attention: Brian Robinson

Tug Fork Land Company
First National Bank Building
Welch, West Virginia 24801
Attention: D. S. Hardin

Gentlemen:

As counsel for TXO Production Corp. as well as the law firm who examined record title to the Tug Fork Land Company lease covering 1,002.74 acres in McDowell County, West Virginia, we have been requested to write you concerning the problem we have found as to the lessor's record title and what TXO intends to do as a result of this situation.

First, despite the fact that questions exist as to who owns the oil and gas under the subject lease and who is therefore entitled to the lessor's royalties, TXO has obtained leases, ratifications and/or quit claim deeds from all possible claimants so that TXO can proceed with its

drilling program on the tract and meet its drilling commitments to Alliance.

Second, the basic title problem encountered regards certain language in the mineral severance deed from Tug Fork Land Company to Leo J. Signaigo, Jr. dated September 2, 1958, recorded in McDowell County Deed Book 238 at page 562. A copy of this deed is enclosed with the relevant language underlined. In interpreting language such as this West Virginia Supreme Court decisions, especially *Jeffrey v. Spruce-Boone Coal Co.*, 112 W. Va. 360, 164 S.E. 292, 86 A.L.R. 966 (1932), and *Prindle v. Baker*, 116 W. Va. 48, 178 S.E. 513 (1935), indicate that title to the oil and gas passed to the grantee in the deed, and as a consequence when Leo J. Signaigo, Jr. then conveyed the minerals to Pocahontas Empire Coal Corporation, which changed its name to Hawley Coal Mining Corporation and then conveyed it to Virginia Crews Coal Company, using the same language, title to the oil and gas passed on to Virginia Crews Coal Company.

If this is the case Tug Fork Land Company would not own any of the oil and gas except that in the Pocahontas 3 and 4 seams and our present leasehold title fails. Because of this distinct possibility or probability, we made an objection and requirement in our report that no drilling could be commenced without Virginia Crews participation.

As a consequence TXO had to purchase a quit claim deed from Virginia Crews Coal Company for any oil and gas rights which Virginia Crews might have, and as a result now either Tug Fork Land Company or TXO is the owner of the oil and gas in place.

Third, in the event Tug Fork and TXO are not able to work out a mutually satisfactory settlement concerning this issue I have been instructed to prepare and file a suit in McDowell County seeking to clear cloud on title and for a declaratory judgment interpreting the language

of the deeds in question and determining present ownership of the oil and gas in question. Such a suit will in no way hinder TXO's drilling activities on this property, only the distribution of possible oil and gas revenues, if discovered and marketed.

Finally, should you have questions as to any of the above do not hesitate to contact me.

Very truly yours,

/s/ Larry L. Skeen
LARRY L. SKEEN

lls/md

encl.

cc: Doug Black
Trent Baulch
Richard H. Brumbaugh

APPENDIX B

PLAINTIFF'S EXHIBIT No. 11

TXO PRODUCTION CORP.
600 Charleston National Plaza
Charleston, West Virginia 25301

304/345-2610

August 15, 1985

Tug Fork Land Company
c/o McDowell County National Bank
Welch, West Virginia 24801

Grover C. Goode
First National Bank Building
Welch, West Virginia 24801

Alliance Resources Corporation
12900 Preston Road
North Dallas Bank, Suite 500
Dallas, Texas 75230

Gentlemen:

Arrangements were made with you to meet at our offices in Charleston earlier today to discuss title problems and our intentions regarding the exploration and development of the McDowell and Wyoming County oil and gas acreage which was assigned to us by Alliance.

Brian Robinson of Alliance (our assignor) attended the meeting, coming from his company's offices in Texas. Our own attorney, Trent Baulch, also flew in from Dallas for the meeting. After waiting for some period and telephoning to determine whether anyone else intended to appear we were advised by Grover Goode that there had been a change in plans and that he and Mr. Hardin were not coming to the meeting. For that reason we take this opportunity to advise you, in writing, of what we planned

to discuss at the meeting and what our intentions are concerning the oil and gas leaseholds in question.

As you are aware Tug Fork Land Company leased 1,002.74 acres in Browns Creek District and Sandy River District, McDowell County, West Virginia to George King by lease dated September 1, 1984, recorded in Deed Book 375 at page 716. This lease was assigned by George King and wife to Alliance Resource Company by assignment dated February 25, 1985, recorded in Deed Book 378 at page 420. In the deed Mr. King reserved a 1/16th overriding royalty and it is our understanding that this override is now shared equally with Mr. Goode who is the attorney for Tug Fork.

The Tug Fork lease, together with two other leases, was assigned to our company by Alliance Resources by assignment dated April 2, 1985, recorded in Deed Book 378 at page 413, and extended by letter agreement dated August 14, 1985.

Our agreement with Alliance provided for a payment of $31,794.80 to Alliance for the three leases (Tug Fork, Sudduth and Toler), which we made, and requires us to commence drilling two wells somewhere on the three assigned leases on or before October 1, 1985. The assignment and agreement further provides that in the event TXO's attorney determines that title has failed Alliance will reimburse TXO the consideration paid for any such lands upon which title is determined to have failed.

Our West Virginia attorneys who examined title to the Tug Fork, Toler and Sudduth leases, and who were also present for today's meeting, have encountered what may amount to a title failure or at least a serious defect regarding the Tug Fork lease but not as to the other two leases. Therefore we have a situation of a partial title failure which is limited solely to the Tug Fork lease. As soon as we were advised of the problem by our attorneys we advised you by letter and we have tried to keep you

advised and to work with you in resolving this problem in order that we might proceed to drill and thus carry out our assignments.

To reiterate briefly the problem stems from Tug Fork's September 2, 1958 deed to Leo J. Signaigo, Jr. in which Tug Fork conveyed to Mr. Signaigo "all the coal *and other minerals and mineral substances* in, on and underlying" the subject 1,002.74 acres (Emphasis added). Our legal research indicates the West Virginia Supreme Court has held that such language of itself in a deed grants title to the oil and gas in place as well as to the coal.

The only reservation or exception in the deed of any relevance concerning the oil and gas is 2.(a) which states:

> "There is excepted and reserved from the operation of this deed: (a) all the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described."

Our legal counsel informs us that in applying accepted general rules of construction to this language, the reservation of oil and gas is probably limited to any oil and gas found in the Pocahontas No. 3 and No. 4 seams of coal and not to any other oil and gas under the subject land. This position seems borne out at least to some extent by the fact that after the deed was recorded Tug Fork never had itself assessed for and never paid taxes upon the oil and gas under the acreage but that instead Mr. Signaigo and his successors in title were assessed for and have in fact been paying the taxes on the oil and gas under the 1,002.74 acres.

Since the time of that deed Mr. Signaigo has made a similar conveyance of the coal and other minerals with similar language to Empire Coal and Land Corporation by deed dated April 11, 1961, recorded in Deed Book 247 at page 500, and Hawley Coal Corporation (Empire

changed its name) conveyed the coal, oil, gas and other minerals to Virginia Crews Coal Company by deed dated July 21, 1983, recorded in Deed Book 370 at page 59.

Believing under the above circumstances, on the advice of our counsel, that the record owner of the oil and gas under the 1,002.74 acres could possibly or even probably be Virginia Crews instead of Tug Fork, we contacted Virginia Crews and were informed they required $10.00 per acre for a quit claim deed for the oil and gas in question, but we were finally able to settle on a price of $6,000.00, which TXO paid in exchange for a quit claim deed.

The $6,000.00 payment together with our other costs and expenses attendant to clearing this title problem on the Tug Fork lease now approximate $15,000-$20,000, not to mention the pro-rata share of the $31,794.80 which was paid to Alliance for the Tug Fork lease. Due to this situation, and in our attempt to reach some amicable settlement, and further in order to avoid what our attorneys advise could require as much as $10,000.00 in additional legal fees if suit is required to resolve this problem, we called today's meeting at our offices which you agreed to attend, but did not.

This leaves us with little alternative but to proceed as best we can to live up to our agreement with Alliance while at the same time attempting to protect our considerable investment in the Tug Fork lease. We want and intend to drill two proposed wells in the very near future, one on the Tug Fork lease and one on the Sudduth lease. However, Mr. Goode informed us today he plans to sue us for damages and raises a West Virginia statute which he says precludes us from questioning our lessor's title. If Mr. Goode is referring to the Attornment Statute, W. Va. Code Chapter 37, Article 6, Section 4 (which we think he is), he is mistaken. Mr. Goode should read *Shearer v. Allegheny Land & Mineral Co.*, 152 W. Va. 616, 165 S.E.2d 369 (1968),

and he will find that in order for that statute to apply a landlord-tenant relationship has to exist but there is no such relationship regarding undeveloped oil and gas leases. The facts of this decision are almost exactly in point with those in our case as there the lessee found out while drilling a well that someone other than its lessor claimed title to the oil and gas under the lease. The lessee then obtained an assignment from the other party claiming title and was later sued by the earlier lessor. The Supreme Court held the attornment statute did not apply and the lessee did only what was right under the circumstances, which is what we are trying to do regarding the present title problem.

We discussed this matter with Brian Robinson while he was at our office earlier today and unless we are legally prevented from doing so we intend to proceed with the drilling of the two wells as planned. However, being offered no assistance or credit for our expenses, we have no recourse but to hold any title we obtained under the quit claim deed from Virginia Crews, and we will be filing a declatory (sic) judgment action in McDowell County naming Tug Fork and Alliance as parties defendant (along with George King and Grover Goode due to your overrides) seeking a court determination and interpretation of the deeds and the ownership of the oil and gas in question. We also intend to seek alternative relief for reimbursement of our expenses to date occasioned by the title problem and pro rata reimbursement of the signing bonus.

Should the court confirm Tug Fork's title to such oil and gas and not our own through the quit claim deed from Virginia Crews, we will continue operating the lease as Alliance's assignee and paying the prescribed royalties to Alliance, King and Goode in accordance with the assignments and overrides on the Tug Fork lease.

In the event you change your minds and wish to discuss this matter or have any questions please do not hesi-

tate to contact us. We believe the declaratory judgment action is the least expensive and most expeditious method to resolve this problem and we hope you take no offense at such a proceeding as we are simply trying to protect our mutual interests and be able to proceed with the drilling program as scheduled despite the possible title failure of the Tug Fork lease. However, please be advised that if Mr. Goode does sue us as he has stated we will pursue all of our legal rights against such a suit and those involved as our intent throughout this matter is not to avoid any of our legal responsibilities but instead to resolve and correct title problems which were created long before we came into the picture which should have been detected and resolved years ago as inexpensively and expeditiously as possible.

Very truly yours,

TXO PRODUCTION CORP.

/s/ D. Michael Good
D. MICHAEL GOOD
Vice President

/tr

cc Larry Skeen
Trent Baulch
Richard H. Brumbaugh
George King

APPENDIX C

PLAINTIFF'S EXHIBIT NO. 3

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Main Street
Ripley, West Virginia 25271

May 15, 1985

TXO Production Corp.
900 Charleston National Plaza
Charleston, West Virginia 25301

Attention: Michael Blumn

Gentlemen:

PRELIMINARY TITLE OPINION

RE: Oil and gas lease dated the 1st day of September, 1984 from Tug Fork Land Company, a West Virginia corporation, to George King on 1,002.74 acres, more or less, Browns Creek District, McDowell County, West Virginia, for a primary term of three (3) years.

DOCUMENTS EXAMINED

All records contained in the offices of the Clerk of the County Commission, Clerk of the Circuit Court, Assessor and Sheriff of McDowell County, West Virginia which pertain to the subject real estate, certified from November 10, 1858 to May 10, 1985 at 10:00 o'clock a.m.

TITLE TO LAND

Subject to the comments and requirements hereinafter set forth:

Surface:

The major portion of the surface is owned by J. A. Blevins, et al., subject, however, to approximately sixteen outsales of parcels ranging from 5 acres in size to small lots 100′ x 110′. Your abstractor has deed reference information and if you so instruct will obtain descriptions and/or title ownership records.

Minerals:

All the coal and other minerals and mineral substances in Virginia Crews Coal Company, a West Virginia corporation.

Royalty:

Virginia Crews Coal Company, a corporation.

Oil and Gas Leasehold:

No active lease of record.
(See Objections and Requirements.)

HISTORY OF TITLE

NOTE: The records contain two chains of title. The first 16 entries of this History of Title are devoted to instruments that were found by the court to be false and fraudulent chains of ownership.

The original patents for 320,000 acres and 480,000 acres were granted unto Robert Morris (a signer of the Declaration of Independence and the Constitution) by the Governor of the Commonwealth of Virginia by patent dated the 23rd day of March, 1795, originally recorded in Tazewell County, Virginia. An outconveyance of 50,000 acres re-

duced the acreage by computation to 750,000 acres; however, Henry B. Harman surveyed the balance and determined that in actuality the boundaries contained only 157,750 acres.

1. By deed dated November 10, 1858, Michael *Bovier* and *Louwesa Bovier*, his wife, purportedly conveyed a 480,000 acre tract of land and a 320,000 acre tract of land to John Herman. This deed was recorded in Deed Book 3 at page 247 originally, now changed to page 266 on the 24th day of May, 1877.

NOTE: The deeds in the false chain of title list the surname Bouvier and Louisa with numerous spellings. This deed affords little, if any, conflict by legal standards to our chain of title which emanates by virtue of the deed from M. Bouvier to Richard Warren in view of subsequent recordation in Tazewell County, Virginia in Deed Book 10 at page 630.

2. By deed dated the 7th day of July, 1865, Michael *Bowvier* and Louisia C. *Bowvier*, his wife, purportedly conveyed 36,750 acres to Johnathan Patterson, Jr., Richard C. Ridgeway and William Bonton. This deed was originally recorded in Deed Book 1 at page 300, now 298.

NOTE: These early deed books have been retyped at some point in time and page numbers have been changed. In addition, the very distinct possibility exists that typing and clerical errors have occurred, especially in view of the early styled penmanship that makes reading difficult at times. This deed does not refer to prior deed of transfer. It has no recordation date. The deed that precludes it was recorded on the 4th day of September, 1869. The deed that follows was recorded on the 12th day of December, 1869.

The conveyance of 36,750 acres was purportedly made pursuant to an agreement and could have represented the balance of the computed acreage that was supposed to exist after Bouvier outconveyances.

This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

3. By deed dated the 15th day of February, 1876, Morgan H. Haskins (marital status unknown) purportedly conveyed a 320,000 acre tract of land to Edward Driscoll. This deed was originally recorded in Deed Book 3 at page 211, now 229, on the 15th day of March, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

4. By deed dated the 5th day of September, 1876, Edward Driscoll and Helen K. Driscoll, his wife, purportedly conveyed a 40,960 acre tract of land (part of the 320,000 acre patent) to Ferdinand William Hermann as Trustee. This deed was originally recorded in Deed Book 3 at page 214, now 232, on the 15th day of March, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

5. By deed dated the 20th day of February, 1877, Edward Driscoll and Helen Driscoll, his wife, purportedly conveyed a part of the 320,000 acre tract (40,960 acres) to Ferdinand William Hermann, Trustee. This deed was originally recorded in Deed Book 3 at page 216, now 233, on the 15th day of March, 1877.

6. By deed dated the 21st day of February, 1866, Michael Bouvier (marital status unknown) purportedly conveyed the 320,000 acre tract of land and the 480,000 acre tract of land to Henry S. Morris. This deed was

originally recorded in Deed Book 3 at page 284, now 301, on the 24th day of August, 1877.

NOTE: Pursuant to court proceedings held in 1879, this deed was cancelled as being fraudulent and made null and void. A second proceeding held in 1883 reinstated the deed. The final decision in 1884 once again set the deed aside as being fraudulent and forged.

7. By deed dated the 10th day of November, 1858, Michael *Bovier* and *Louwesa Bovier*, his wife, Thomas Beck (widower) and David S. Hollister (marital status unknown) purportedly conveyed the 480,000 acre tract and the 320,000 acre tract of land to John Herman. This deed was originally recorded in Deed Book 3 at page 247, now 266, on the 24th day of May, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and dates.

8. By deed dated the 11th day of July, 1877, Ferdinand William Hermann, Trustee, purportedly conveyed an interest in the 320,000 acre tract of land to Albert Karntz. This deed was originally recorded in Deed Book 3 at page 288, now 306, on the 24th day of August, 1877.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

9. By deed dated the 11th day of July, 1877, Ferdinand William Hermann, Trustee, purportedly conveyed an interest in the 320,000 acre tract of land to Henry Woellner. This deed was originally recorded in Deed Book 3 at page 292, now 310, on the 24th day of August, 1877.

10. By deed dated the 16th day of July, 1876, Morgan H. Haskins (marital status unknown) purportedly conveyed his interests in the 320,000 acre tract of land to Smith L. Bellows. This deed was originally recorded in

Deed Book 3 at page 373, now 382, on the 5th day of December, 1877.

11. By deed dated the 29th day of October, 1878, Morgan H. Haskins (marital status unknown) purportedly conveyed a 580,000 acre tract of land to Harrison Hoyt. This deed was originally recorded in Deed Book 4 at page 22, now 11, and has no date of recordation.

NOTE: The preceding deed has no date of recordation, but the following deed was recorded on the 12th day of March, 1879.

This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

12. By deed dated the 9th day of January, 1878, Ferdinand William Hermann and Vitula Hermann, his wife, purportedly conveyed a 3,840 acre tract of land to Mary Jane Akerman. This deed was originally recorded in Deed Book 4 at page 36, now 22, and has no recordation date. The deed that immediately precedes this deed was recorded on the 12th day of April 1879.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

13. By deed dated the 8th day of September, 1871, Morgan H. Haskins (marital status unknown) purportedly conveyed a 320,000 acre tract of land to Harris Hoyt. This deed was originally recorded in Deed Book 4 at page 60, how 39, on the 16th day of May, 1879.

NOTE: This deed does not impair our chain of title in view of its subsequent execution and recordation dates.

14. Mary L. Sacia, et al., as plaintiffs, caused to be originally recorded in Deed Book 4 at page 111, now 73, a Notice of Lis Pendens on the 28th day of August, 1879,

that was executed on the 22nd day of July, 1879. The announced purpose of the court action was to set aside forged deeds.

15. By deed dated the 25th day of August, 1879, Harris Hoyt and Marie E. Hoyt, his wife, purportedly conveyed the 480,000 acre tract of land to Henry W. Adams. The deed was recorded in Deed Book at page 105 on the 10th day of October, 1879.

NOTE: Chancery Order Book 1 at page 301, contains an order reflecting the court's action in respect to the setting of this deed and others aside as based upon fraudulent and forged documents of title.

16. On the 8th day of July, 1884, the Circuit Judge of McDowell County, West Virginia caused to be recorded a decree that was rendered by said Court at the April term in 1884. Apparently the cases that were pending had been joined and were styled S. G. B. Cook, et al. vs. Mary L. Sacia, et al. and the case addressed the adverse claims of title that arose as a result of the numerous deeds of record that were in conflict. The Court decreed that the deed from Bouvier to Morris (see entry 6) dated April 21, 1866 "was not genuine, but a forgery". The Court reasoned that Bouvier had conveyed away the lands "long years before" and the grantee had constructive notice of the conveyances. The Court found that:

> ". . . the said deed of 21st of February, 1866 purporting to have been made by Michael Bouvier to Henry S. Morris and all other deeds and conveyances to parties claiming under, by or through the said deed are hereby declared void."
>
> ". . . the said Iaeger, Simpson, Warren's heirs and others claiming under the deeds and title of Bouvier made pursuant to the agreement of 7th day of December, 1850 be and are hereby declared valid and subsisting title".

NOTE: The deed on which we base our chain of title was declared valid and subsisting title and emanates from Richard Warren. The records in all probability contained other deeds which your abstractor could not locate due to title springing from nowhere and the additional problem that resulted from changing page numbers; however, I am satisfied that any adverse claims that would affect title that emanates from Richard Warren prior to 1884 were resolved by the above decision.

ACTUAL HISTORY OF TITLE

17. By deed dated the 7th day of July, 1985, Richard Warren and Susan B. Warren, his wife, conveyed an undivided one-half (1/2) of one-tenth (1/10) of 800,000 acres less 50,000 acres (15,750 acres) to Lessack H. Simpson. This deed was recorded in Deed Book 1 at page 174 on the 9th day of July, 186/.

18. By deed dated the 30th day of May, 1872, Lessack H. Simpson and Catherine Simpson, his wife, conveyed an undivided one-half (1/2) of fifteen-one-hundred fiftieths (15/150) of the 15,750 acres to Solomon L. Simpson. This deed was originially recorded in Deed Book 2 at page 179, now 161, on the 12th day of June, 1872.

19. By will dated the 29th day of March, 1877, Lissack H. Simpson gave powers to dispose of his estate to Solomon L. Simpson and Naphtali Simpson as Executors of his said estate, the proceeds to be divided among his heirs as provided in said will. This will was recorded in Will Book 2 at page 12 on the 6th day of January, 1909.

20. By quit-claim deed dated the 27th day of February, 1875, Solomon L. Simpson (marital status unknown) conveyed all of his right, title and interest in one-half

(1/2) of his undivided interest to Victory L. Simpson. This deed was originally recorded in Deed Book 3 at page 97, now 110, on the 24th day of February, 1876.

21. By deed dated the 1st day of January 1876, Solomon L. Simpson (marital status unknown) conveyed all of his right, title and interest in an undivided one-half (1/2) of 15,750 acres to Frederick Lewis. This deed was originally recorded in Deed Book 3 at page 98, now 111, on the 24th day of February, 1876.

NOTE: This deed was given in connection with an assignment in trust to aid in the execution of said assignment.

22. By deed dated the 25th day of September, 1876, Frederick Lewis as an assignee of the estate of Solomon L. Simpson conveyed all of his right, title and interest in an undivided one-half (1/2) of the 15,750 acre tract to Victoria L. Simpson. This deed was originally recorded in Deed Book 3 at page 172, now 180, on the 16th day of October, 1876.

23. By will dated the 20th day of June, 1873, Richard Warren devised unto his wife one-half (1/2) of all lands and devised the other one-half (1/2) of all lands to the children of his first wife "who shall be living at my death equally". This Last Will and Testament was originally recorded in Deed Book 4 at page 5, now 1, on the 15th day of January, 1879.

NOTE: This is an extremely lengthy will with three (3) codicils. I have determined from the records that the children of Richard Warren and his first wife were Henry Warren, Emma Warren and Angelina Warren.

24. By quit-claim deed dated the 11th day of February, 1882, Victoria Simpson and Solomon L. Simpson, her husband, conveyed an undivided one-sixth (1/6) of the 15,750 acre tract to Solomon L. Simpson and Naphtali L. Simpson as Executors of the Will of Lissack H. Simpson. This deed was recorded in Deed Book 6 at page 271 on the 14th day of May, 1883.

25. By deed dated the 25th day of May, 1885, Susan Warren, wife of Richard, now widowed, conveyed an undivided one-fourth (1/4) of the 15,750 acres that was devised to her by her husband, Richard, to Solomon L. Simpson. This deed was recorded in Deed Book 7 at page 558 on the 22nd day of July, 1885.

26. By deed dated the 26th day of May, 1885, Solomon L. Simpson as sole surviving Executor of the Will of Lissack H. Simpson, conveyed an undivided one-half (1/2) of the 15,570 acre tract to Garrett S. Mott and James G. Smith. This deed was recorded in Deed Book 7 at page 551 on the 21st day of July, 1885.

NOTE: This undivided interest was a part of the interests acquired from Warren in Deed Book 6 at page 135.

27. By deed dated the 12th day of September, 1885, Henry Warren and Alice A. Warren, his wife, and Paul Guerra and Emma G. Guerra, his wife, and Sigismund G. Nonne and Angelina L. Nonne, his wife, conveyed an undivided one-fourth (1/4) of the 15,570 acre tract to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 25 on the 3rd day of December, 1886.

NOTE: The grantors are the children of Richard Warren and his first wife, who survived Richard, together with his second wife, Susan B. Warren.

28. By deed dated the 5th day of January, 1886, Solomon L. Simpson conveyed a one-fifty-fith (1/55) part of 800,000 acres less 50,000 acres, finally surveyed by Hermann as 15,750 acres, to Alfred L. Simpson. This deed was recorded in Deed Book 8 at page 398 on the 4th day of January, 1886.

NOTE: There appears to have been a clerical error in that the dates indicate recordation prior to execution.

29. By deed dated the 1st day of July, 1887, Alfred L. Simpson (marital status unknown) conveyed all of his right, title and interest in the subject acreage to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 27 on the 9th day of September, 1887.

NOTE: This deed had no notarial seal affixed or indicated and was executed outside of the boundaries of the State of West Virginia.

30. By deed dated the 1st day of July, 1887, Alfred L. Simpson (marital status unknown) conveyed all of his right, title and interest in the subject acreage to Solomon L. Simpson. This deed was recorded in Deed Book 9 at page 27 on the 9th day of September, 1887.

NOTE: This deed is the same as set out in entry 29 (see above) and had a notarial seal affixed thereto.

31. By deed dated the 9th day of August, 1887, Garrett S. Mott and Hannah A. Mott, his wife, and James D. Smith and Harriet L. Smith, his wife, conveyed all of their right, title and interest in the subject acreage back to Solomon L. Simpson, subject to claims that were junior in nature. This deed was recorded in Deed Book 9 at page 73 on the 9th day of September, 1887.

NOTE: At this point in time Solomon L. Simpson had consolidated all of the outstanding undivided interests and apparently had satisfied the requirements of Henry McCormick, who on the same date became the purchaser of the 15.750 acres (see next entry).

32. By deed dated the 9th day of August, 1887, Solomon L. Simpson and Victoria Simpson, his wife, conveyed

the 15,750 square acres, more or less, to Henry McCormick. This deed was recorded in Deed Book 9 at page 75 on the 13th day of September, 1887.

NOTE: This deed contained extensive back references to deeds, patents, etc. and subjected the conveyance to such junior claims that might exist and errors in survey, etc. This area was fraught with adverse claims of squatters, holders of junior patents, fraudulent deeds, etc. and the grantee took upon himself the burden of removing same, if they existed. The owners to this point in time were all residents of other states and countries.

33. By will dated the 3rd day of March, 1894 (last codicil), Henry McCormick of Harrisburg, Pennsylvania made certain specific bequests and placed the remainder of his large estate, including the subject acreage, in trust to be divided equally among his named heirs to Henry B. McCormick and Vance C. McCormick as Trustees, together with the necessary power to dispose of the same. This will, together with the two codicils, was recorded in Will Book 1 at page 103 on the 20th day of May, 1901.

34. By deed dated the 3rd day of March, 1902, Henry B. McCormick and Vance McCormick, as Trustees, conveyed a 7.64 acre tract of land and a 381.1 acre tract of land to Hensley Land Company, a corporation. This deed was recorded in Deed Book 30 at page 353 on the 31st day of March, 1902.

NOTE: Your abstractor found no record of the recordation of a certificate of incorporation for Hensley Land Company. A vendor's lien was retained by the grantors but was released in Release Book 2 at page 103.

35. By agreement dated the 3rd day of October, 1900, Henry B. McCormick and Mary Boyd McCormick, his wife, and Vance McCormick (marital status unknown)

and Anne McCormick (marital status unknown) entered into an agreement to hold and operate the trust and to divest at a later date. This agreement contained the terms of the operation of the estate and was quite extensive. This agreement was recorded in Deed Book 30 at page 346 on the 31st day of March, 1902.

36. By deed dated the 28th day of June, 1915, Hensley Land Company, a corporation, conveyed the 7.64 acre tract of land to Maude A. Rucker (33/50), Margaret C. Rucker (1/50) and W. W. Hughes (16/50). This deed was recorded in Deed Book 69 at page 97 on the 17th day of July, 1915.

NOTE: Recitations in this deed advise that the affairs of the corporation were being wound up and that this was a division of these lands that were assets of the corporation in the same proportions as the shareholders' interests indicate.

37. By deed dated the 20th day of December, 1920, Maude A. Rucker (widow) and Margaret Rucker Shannon and E. Robert Shannon, her husband, and W. W. Hughes and Rose N. Hughes, his wife, conveyed the 7.64 acre tract of land to Welch Pocahontas Land Company. This deed was recorded in Deed Book 85 at page 316 on the 20th day of December, 1920.

38. By deed dated the 9th day of July, 1920, Henry B. McCormick and Vance C. McCormick, as Trustees, conveyed a 455 acre tract of land to Welch Pocahontas Land Company. This deed was recorded on the 30th day of July, 1920 in Deed Book 83 at page 454.

NOTE: Your abstractor did not find a recorded certificate of incorporation for Welch Pocahontas Land Company. This deed contained a reservation of rights of way to Norfolk and Western Railway Co.

39. By deed dated the 19th day of January, 1921, Henry B. McCormick and Vance C. McCormick, as Trustees, conveyed a tract of land containing 547.7 acres to Welch Pocahontas Land Company, a corporation. This deed was recorded in Deed Book 85 at page 399 on the 19th day of January, 1921.

NOTE: At this point in time the three tracts of land which comprise the acreage that is the subject of this report were vested in Welch Pocahontas Land Company.

40. By deed dated the 18th day of August, 1926, Welch Pocahontas Land Company and Wise Pocahontas Coal Company, a corporation, conveyed the 547.7 acre tract, the 455 acre tract and the 7.64 acre tract to Westchester Pocahontas Collieries Company. This deed was recorded in Deed Book 106 at page 99 on the 18th day of August 1926.

NOTE: Welch Pocahontas Land Company had granted a thirty year coal lease on the subject acreage to Wise Pocahontas Coal Company (see lease section) and Wise joined in as a grantor for the purpose of conveying its interests in the coal lease. In addition, by assignment recorded in Deed Book 106 at page 102, A. H. Bouchard and Lydia Bouchard, his wife, had assigned all of the rights that he had acquired from Welch Pocahontas Land Company and Wise Pocahontas Coal Company properties in an unrecorded option to purchase dated July 16, 1926, to Westchester Pocahontas Collieries Company in another unrecorded instrument.

No record of certificate of incorporation for Wise Pocahontas Coal Company or Westchester Pocahontas Collieries Company was found.

41. By an instrument dated the 16th day of August, 1926, Westchester Pocahontas Collieries Company, a cor-

poration, agreed to execute a deed of trust and issue $165,000.00 worth of bonds. This instrument was recorded in Deed of Trust Book 25 at page 86 on the 18th day of August, 1926.

42. By deed of trust dated the 15th day of March, 1927, *Westchester-Pocahontas* Collieries Company conveyed the subject acreage (547.7 acres, 455 acres and 7.64 acres) in trust to E. S. Thompson and Graham Sale as Trustees to secure the McDowell County National Bank in the amount of $300,000.00 for a bond issue. This instrument was recorded on the 2nd day of August, 1927 in Deed of Trust Book 27 at page 28.

NOTE: An additional deed of trust (in reality a chattel mortgage) involving these same parties was recorded in Deed of Trust Book 26 at page 137. A default occurred and the Trustees were forced to sell (see next entry).

43. By deed dated the 7th day of March, 1930, E. S. Thompson and Graham Sale, as Trustees conveyed the 1,010.34 acres to R. L. Page. This deed was recorded in Deed Book 117 at page 124 on the 13th day of September, 1930.

44. By deed dated the 13th day of June, 1930, R. L. Page and Atta P. Page, his wife, conveyed the 1,010.34 acres to Famous Pocahontas Coal Company. This deed was recorded in Deed Book 117 at page 128 on the 13th day of September, 1930.

NOTE: No recordation of certificate of incorporation was found for Famous Pocahontas Coal Company.

45. By deed dated the 12th day of June, 1935, Henry B. McCormick and Vance C. McCormick, as Trustees, executed a deed designed to divest the trust created earlier (see entries 34 and 35) and conveyed the corpus to Anna McCormick, Henry B. McCormick and Vance C.

McCormick, as individuals. This deed was recorded in Deed Book 130 at page 36 on the 25th day of June, 1935.

NOTE: Attached to this deed your abstractor found the copies of the agreements entered into on October 3, 1990 and a supplement to the agreement dated January 31, 1901. These instruments were apparently recorded to divest the trust of other properties it retained; however, the inclusion of the agreements made clear the authority of the Trustees.

46. *Outsale.* By deed dated the 19th day of December, 1938, Famous Pocahontas Coal Company conveyed a 7.6 acre tract of land to S. M. Burgess; a third party, Frank Beamer, joined in said deed to quit-claim his interest, if any, in said acreage. This deed was recorded in Deed Book 141 at page 103 on the 19th day of December, 1938.

NOTE: The grantors retained a vendor's lien which was released in Release Book 18 at page 242. The grantor retained a right of way 30 feet in width for the purpose of ingress and egress to the lands it retained. There was no reservation of oil, gas or minerals.

47. *Outsale.* By deed dated the 15th day of April, 1940, Famous Pocahontas Coal Company conveyed a 50 acre tract of land to Mrs. Cora Lee Smith. This deed was recorded in Deed Book 159 at page 288 on the 27th day of March, 1944.

NOTE: The grantor reserved all of the oil, gas and minerals underlying the subject acreage. This tract was a part of the 547.7 acre tract of land. The grantor retained a vendor's lien which was released in Release Book 23 at page 454.

48. By deed dated the 14th day of March, 1945, Famous Pocahontas Coal Company conveyed the subject acreage to Roderfield Realty Company. This deed was

recorded in Deed Book 162 at page 459 on the 14th day of March, 1945.

NOTE: The Certificate of Incorporation for Roderfield Realty Company is recorded in Record of Incorporation Book 1 at page 363. This certificate provides for automatic expiration fifty years after March 12, 1930.

49. By deed dated the 29th day of October, 1945, Roderfield Realty Company conveyed the surface only of the 1,002.74 acre tract to J. A. Blevins. This deed was recorded in Deed Book 165 at page 420 on the 29th day of October, 1945.

NOTE: Severance of minerals takes place at this point in time. The records in the office of the Assessor indicate that J. A. Blevins has made at least seven outconveyances of surface ranging in size from five acres to 100′ x 110′ lots. The larger tracts have been subdivided into smaller parcels. Your abstractor gathered information that will assist your landman in locating these parcels. Should you desire certification of ownership of the surface lots, please advise.

50. By deed dated the 16th day of May, 1958, Roderfield Realty Company conveyed:

> ". . . all of its real property, including, but not limited to, fee, surface and mineral, of all kinds and descriptions, now owned by it, including its lands, and interests in lands, and all property rights and privileges appurtenant thereto, situate in McDowell County, West Virginia, and any other lands or interest in lands wherever situate,"

to Tug Fork Land Company, a corporation. This deed was recorded in Deed Book 237 at page 518 on the 30th day of June, 1958.

NOTE: Record of Incorporation Book 4 at page 452 contains a certificate of dissolution granted on the 20th day of March, 1958, two months before the above deed was executed; however, it is the opinion of your abstractor that authority existed for the execution of this deed as a part of the winding down process.

This deed was made subject to an oil and gas lease to United Fuel Gas Company, an oil and gas lease to Hope Natural Gas Company and a lease of surface only to J. B. Crozier for use as a siding.

The certificate of incorporation for Tug Fork Land Company is recorded in Record of Incorporation Book 4 at page 460.

51. By deed dated the 2nd day of September, 1958, TUG FORK LAND COMPANY, a corporation, conveyed "all the coal and other minerals and mineral substances in, on and underlying" the 1,002.74 acres to Leo J. Signaigo, Jr., subject to certain specified reservations and exceptions, including a reservation of "All the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams in said three tracts of land above described." This deed was recorded in Deed Book 238 at page 562 on the 20th day of September 1958.

NOTE: This instrument and the provisions contained therein, together with other indicia of ownership such as the taxation of the coal and other minerals, in the opinion of your abstractor, is a conveyance of the oil and gas underlying the subject acreage. Attached hereto you will find a copy of the deed and a copy of the memorandum of opinion written by Larry L. Skeen which contains further information. The land books of the Assessor contain no entries for Tug Fork Land Com-

pany and Tug Fork paid no taxes on the oil and gas. However, the grantee, Leo J. Signaigo, Jr., was taxed from 1959 to 1961 with 1,002.74 acres on Hensley Creek for minerals or timber and those corporate entities that follow him in the chain of title have paid to the present (see the Encumbrances section of this report, subheading *Taxes*).

United Fuel Gas Co. obtained a lease from Roderfield Realty Co. in 1956 and in 1960 they obtained an extension of the lease from Tug Fork Land Company (see Lease section of this report) and drilled upon the subject acreage. It seems evident that since United Fuel drilled after September of 1958 they did not reach the same conclusion as to oil and gas ownership as we have, since your abstractor could find no record of a lease from Leo J. Signaigo, Jr. or his assigns to United Fuel. United Fuel released their lease in 1966.

52. By deed dated the 11th day of April, 1961, Leo J. Signaigo, Jr. (marital status unknown) conveyed all the coal and other minerals and mineral substances underlying the 1,002.74 acre tract of land to Empire Coal and Land Corporation. This deed was recorded in Deed Book 247 at page 500.

NOTE: Your abstractor found no record of the recordation of a certificate of incorporation for Empire Coal and Land Corporation; however, Record of Incorporation Book 6 at page 289 contains a Certificate of Ownership and Merger wherein eight (8) companies and/or corporations including Empire Coal and Land Corporation were merged into Pocahontas Empire Coal Corporation on December 31, 1969. The Certificate of Incorporation for

Pocahontas Empire Coal Corporation is recorded in Record of Incorporation Book 4 at page 282.

53. By an instrument dated the 8th day of September, 1978, Leo J. Signaigo, Jr. (marital status unknown) released his first option to purchase the coal in Seams #3 and #4 as granted in Deed Book 238 at page 566.

54. Record of Incorporation Book 6 at page 295 contains a Certificate of Change of Corporate Name from Pocahontas Empire Coal Corporation to Hawley Coal Mining Corporation dated February 2, 1970, and recorded on February 24, 1970.

55. By deed dated the 21st day of July, 1983, Hawley Coal Mining Corporation conveyed all the coal and other minerals and mineral substances underlying the subject acreage (1,002.74 acres) to Virginia Crews Coal Company, a corporation. This deed was recorded in Deed Book 370 at page 59 on the 2nd day of August, 1983.

NOTE: Your abstractor found no record of the recordation of a Certificate of Incorporation for Virginia Crews Coal Company.

OIL AND GAS LEASES

1. By oil and gas lease dated the 17th day of December, 1942, Famous Pocahontas Coal Company leased the subject acreage to Hope Natural Gas Company for a primary term of ten (10) years or duration of production. This lease was recorded in Deed Book 156 at page 133 on the 4th day of December, 1943.

NOTE: This lease has expired by its own terms unless a well was drilled during its primary term and production is still taking place (see attached copy).

2. By oil and gas lease dated the 28th day of February, 1952, Roderfield Realty Company leased the subject

acreage to Hope Natural Gas Company for a primary term of five (5) years or duration of production. This lease was recorded in Deed Book 200 at page 114 on the 13th day of April, 1952.

NOTE: By release dated August 27, 1952 and recorded in Deed Book 202 at page 480 on the 11th day of September, 1952, Hope Natural Gas Company surrendered the above lease.

3. By oil and gas lease dated the 8th day of October, 1956, *Roderfield Realty Co., Inc.* leased the subject acreage to United Fuel Gas Company for a primary term of five (5) years or duration of production. This lease was recorded in Deed Book 227 at page 412.

4. By oil and gas lease dated the 27th day of September, 1960, Tug Fork Land Company leased the subject acreage to United Fuel Gas Company by obtaining a five year extension of the above lease from Roderfield beginning October 8, 1961.

NOTE: United Fuel Gas Company released the original lease from Roderfield and extension from Tug Fork by release dated the 28th day of January, 1966 and recorded in Deed Book 265 at page 242 on the 9th day of February, 1966.

5. By oil and gas lease dated the 8th day of September, 1981, Tug Fork Land Company leased the subject acreage to Georgia Fuels Company for a primary term of two (2) years or duration of production. This lease was recorded in Deed Book 361 at page 439 on the 18th day of September, 1981.

6. By oil and gas lease dated the 1st day of September 1981, Tug Fork Land Company leased the subject acreage to Georgia Fuels for a primary term of two (2) years or duration of production. This lease was recorded in Deed Book 366 at page 369 on the 29th day of September, 1982.

NOTE: This lease superseded the lease executed on September 8, 1981 and has expired by its own terms unless production took place during its primary term. The records reflect the fact that the President of Georgia Fuels was George King, in all probability the same George King to whom Tug Fork next leased the land. This lease has not been released (see attached copy).

7. By oil and gas lease dated the 1st day of September, 1984, Tug Fork Land Company leased the subject acreage to George King for a primary term of three (3) years or duration of production. This lease was recorded in Deed Book 375 at page 716 on the 27th day of September, 1984.

NOTE: This lease has not been released (see attached copy) and is the subject of this report.

ENCUMBRANCES

MORTGAGES & JUDGMENTS:

1. By Notice of Business and Occupation Tax Lien dated April 16, 1984, and recorded in Judgment Lien Docket Book 20 at page 288, the State Tax Department provided constructive notice of taxes due and owing by Virginia Crews Coal Company in the total amount of $7,688.35 plus penalty and interest until paid. This Notice was recorded on the 23rd day of April, 1984 and has not been released of record.

2. By Lis Pendens recorded on the 18th day of February, 1983 in Lis Pendens Book 2 at page 74, constructive notice was provided of Civil Action 82-C-398 filed in the McDowell County Circuit Court and was designed to affect the described lands of Hawley Coal Mining Corporation to a claim for $9,362,500.00 in compensatory damages and $50,000,000.00 in punitive damages for breach of contract.

NOTE: Your abstractor is of the opinion that this instrument involves lands other than the acreage that is the subject of this report; however, this matter will be addressed in the Special Objections and Requirements section of this report.

3. Numerous Mechanics' Liens have been filed against Hawley Coal Mining Corporation in Mechanics' Lien Book 6 at pages 372, 218, 217, 216 and 215 by employees for unpaid wages.

NOTE: It is the opinion of your abstractor that the Mechanics' Lien filed in Book 6 at page 372 does not affect the subject acreage since it was filed on the 2nd day of February, 1985, after Hawley's conveyance to Virginia Crews Coal Company. It is the further opinion of your abstractor that the remainder of the above mentioned Mechanics' Liens would be barred by the statute of limitations. In addition, I am advised that the distant possibility exists that Hawley Coal Mining Corporation has filed bankruptcy; however, your abstractor could find no record of the same in the office of the County Clerk.

EASEMENTS:

1. By instrument dated January 1, 1979, recorded February 27, 1979 in Deed Book 347 at page 659, Howley Coal Mining Corporation granted a pipeline easement to Hope Natural Gas Company.

2. By instrument dated February 6, 1973, recorded in Deed Book 304 at page 67, Hawley Coal Mining Corporation granted a standard power line right of way to Appalachian Electric Power Company.

3. By instrument dated February 27, 1967, recorded in Deed Book 271 at page 73, Pocahontas Empire Coal

Corporation granted a standard power line right of way to Appalachian Electric Power Company.

4. By instrument dated September 11, 1963, recorded January 9, 1964 in Deed Book 257 at page 314, Pocahontas Empire Coal Corporation granted a standard power line right of way to Appalachian Electric Power Company.

5. By instrument dated June 3, 1960, recorded June 16, 1960 in Deed Book 245 at page 119, Pocahontas Empire Coal Corporation granted a standard power line right of way to Appalachian Electric Power Company.

6. By instrument dated April 21, 1954, recorded June 2, 1954 in Deed Book 212 at page 284, Roderfield Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

7. By instrument dated July 7, 1952, recorded December 3, 1952 in Deed Book 204 at page 211, Roderfield Realty Company granted a right of way for the construction of an 8″ gas pipeline to Godfrey L. Cabot, Inc.

8. By instrument dated July 18, 1950, recorded November 30, 1950, Roderfield Realty Company granted a right of way for the construction of a 6″ gas pipeline to Godfrey L. Cabot, Inc.

9. By instrument dated January 17, 1950, recorded February 20, 1950 in Deed Book 190 at page 194, J. A. Blevins and Ora Blevins, his wife, granted a standard power line right of way to Appalachian Electric Power Company.

10. By instrument dated May 15, 1947, recorded February 2, 1948 in Deed Book 179 at page 56, Roderfield Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

11. By instrument dated November 6, 1946, recorded December 28, 1964 in Deed Book 172 at page 413, Roder-

field Realty Company granted a standard power line right of way to Appalachian Electric Power Company.

12. By instrument dated August 3, 1945, recorded September 7, 1945 in Deed Book 165 at pages 27, 98 and 99, Roderfield Realty Company granted standard power line rights of way to Appalachian Electric Power Company.

13. By instrument dated November 8, 1944, recorded November 15, 1944 in Deed Book 161 at page 481, Famous Pocahontas Coal Company granted a right of way 60 feet in width for the construction, operation and maintenance of a telephone and telegraph line to The Chesapeake and Potomac Telephone Company of West Virginia.

NOTE: This instrument increased the width of a previously granted right of way 40 feet in width (see next entry).

14. By instrument dated November 29, 1924, recorded December 3, 1924 in Deed Book 100 at page 403, Welch Pocahontas Land Company granted a right of way 40 feet in width for the construction, operation and maintenance of telephone and telegraph lines to The Chesapeake and Potomac Telephone Company of West Virginia.

15. Norfolk and Western Railway Company obtained a right of way from Westchester Pocahontas Coal Company for use as a siding by instrument dated August 7, 1923 and recorded on the 1st day of October, 1923 in Deed Book 96 at page 85.

TAXES:

The coal and minerals for the subject real estate are listed for taxation in the 1984 Browns Creek District Land Books as follows:

Pocahontas Empire Coal Co., 311.96 A. Coal at 200 A. 1010. 34 A. Hensley Creek Min.

Taxes for the year 1984 and all prior years have been paid. Taxes for the year 1985 constitute a statutory lien against the subject acreage but are not yet due, ascertainable or payable. Taxes are $901.99 per half year.

The taxation for the coal and minerals for the subject acreage will appear on the 1985 Land Books as follows:

Virginia Crews Coal Co., 1010.34 Ac. Min. & Coal only, Hensley Creek and 311.96 Extra legal - N; Homestead - N

NOTE: Normally we would not report tax listings for past years; however, since we deem these listing to be important indicia of ownership, the listing were as follows:

1920	McCormick, Henry	30.35.16 A.
21-26	Welch Poca. Land Co.	7.64, 455, 547.7 Ac.
27-30	Westchester Coal Co.	7.64, 455, 547.7
31-38	Famous Poca. Coal Co.	7.64, 455, 547.7456 A.
39-44	Famous Poca. Coal Co.	7.64, 547.7, 456 A.
45	Famous Poca. Coal Co.	7.64, 547.7, 456 A.
46-58	Roderfield Realty Company	7.64, 455, 540.10 A.
59-61	Signaigo, Leo J., Jr.	1002.74 Min. or Timber, Hensley Creek
62-70	Empire Coal & Land Co.	1,010.34 Ac. Hensley Cr.
71	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr.
72-78	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr. Estate owned and description
79-82	Pocahontas Empire Coal Corp.	1,010.34 Ac. Hensley Cr. Min.
1983 (Begin Computer)		
	Pocahontas Empire Coal Co.	311.96 A. Coal at 200 1,010.34 Ac. Hensley Cr. Minerals
1984	Pocahontas Empire Coal Co.	311.96 A. coal at 200 A 1,010.34 Ac. Hensley Cr. Minerals; $901.99 per half year. Paid August 1984, March 1985

NOTE: On two different occasions these interests were sold for taxes, but notations on the Assessor's Land Books indicate redemption took place prior to execution of a deed for said interests.

Taxes for the surface which is presently in several different parcels (at least 16) is not reported. Should this information be required, please advise.

SPECIAL OBJECTIONS AND REQUIREMENTS

1. The deed set out in paragraph 28 of the History of Title indicates that it was recorded prior to the date of execution. It is my opinion that this is a clerical error and any problem caused by this error would have been cured by the statute of limitation.

2. Paragraphs 34, 38, 40, 44 and 48 indicate failure to record certificates of incorporation for the named corporate entities. West Virginia law requires recordation of certificates of incorporation in every county in which a corporate entity does business. Obtain and record certificates of incorporation for these named corporations.

3. From the deed records and the lack of signature by the respective spouses of Vance McCormick and Anne McCormick your abstractor cannot determine marital status; however, the individuals if living would be in excess of 100 years of age and dower interests, if any, would be negligible.

4. The deed that is set out in paragraph 46 of this report in the History of Title section represents a fee conveyance and the 7.6 acres is located inside of the boundaries of the 547.7 acre tract. Locate and define the boundaries of this tract and under no circumstances locate and/or drill on the 7.6 acre parcel.

5. The deeds that we set out in paragraphs 47 and 49 of this report in the History of Title section represent outsales of surface and in the event that deep well drilling is contemplated on the subject acreage, written consent for valuable consideration must first be obtained from the surface owners in compliance with the provisions of West Virginia Code Chapter *22, Article 4-A*, Sections *7(b)(4)*, as amended.

6. Satisfy yourselves by physically inspecting the premises that at present there are no oil or gas wells situate thereon or upon any adjoining leases with which the subject leasehold has been pooled or unitized which are still producing oil and/or gas thereby verifying that the unreleased oil and gas leases described in this report have expired by their own terms.

7. The deed referred to in paragraph 51 of the History of Title is, of course, quite a crucial matter to your lessor's title, and under the present circumstances and without a ratification or other document from Virginia Crews Coal Company you would not have a good and defensible right and title to develop the oil and gas. Furthermore, as mentioned in the letter opinion of my brother referred to in the Note in paragraph 51, it is our opinion that Virginia Crews Coal Company has a better title to the oil and natural gas under the subject realty, except for the oil and gas in the Pocahontas No. 3 and No. 4 seams, than does Tug Fork Land Company.

Therefore, no drilling should be contemplated unless and until such time as either a ratification or other legal document of lease or conveyance is obtained from Virginia Crews Coal Company.

Furthermore, in looking at the language in the deed in question as Tug Fork Land Company might view it, it would have to be their position that the language in paragraph 2(a) regarding "all the oil and gas" would not be limited to just the Pocahontas No. 3 and No. 4 seams. Of course such an interpretation is possible and could conceivably be confirmed by a Court, however it is our opinion that you would be stretching that language by doing so as that language must be read in conjunction with the remainder of the sentence which provides for reservation as well of all the coal in the Pocahontas No. 3 and No. 4 seams in the three tracts of land being conveyed. On the other hand, it would not be safe to drill upon the tract merely upon a quit claim deed, lease or

assignment just from Virginia Crews Coal Company, without some lease or ratification from Tug Fork Land Company as they are obviously claiming title to the oil and gas by reason of their lease to your company. You may, therefore, wish to test Tug Fork Land Company's claim to title by either a suit to clear cloud on title in advance of drilling or upon obtaining a lease, quit cliam deed or ratification from Virginia Crews Coal Company proceed to drill the property and in the event of production file suit at that juncture to test the title to the oil and gas.

8. Coal is the dominant estate underlying the subject acreage. Comply with the pertinent provisions of the West Virginia statutes that require notice, etc. to the owner and operator of the various seams. (See West Virginia Code Chapter 22, Articles 4, 5 and 7.)

DISCLAIMERS AND ADVISORY COMMENTS

1. This opinion does not cover any matters not revealed by the materials examined, rights of the parties in possession or matters which could only be determined by an investigation upon the ground or by an accurate survey of the land.

2. The personal records examination which I performed and upon which I have relied appears satisfactory in scope and substance and I believe that you and I are justified in relying upon the same.

3. The oil and gas lease described in this report provides for a one-eighth (1/8) landowner's royalty upon oil, gas and other hydrocarbons calculated at the well head price.

4. All references herein to deed books, lease books, will books, etc. refer to those books maintained in the office of the Clerk of the County Commission of McDowell County, West Virginia, unless otherwise so stated, and this opinion is subject to all errors and omissions in the

records and indices of records in the offices of the Clerks of the County Commission, Circuit Court, Assessor and Sheriff of McDowell County, West Virginia, and is further subject to all unrecorded Mechanic's and Materialmen's Liens affecting the subject property.

Very truly yours,

/s/ Kennad L. Skeen
KENNAD L. SKEEN

KLS/bjr

Attachments

APPENDIX D

PLAINTIFF'S EXHIBIT NO. 2

SKEEN AND SKEEN
Attorneys and Counsellors at Law
216 Mail Street
Ripley, West Virginia 25271

May 9, 1985

Mr. Mike Blumn
TXO Production Corp.
900 Charleston National Plaza
Charleston, West Virginia 25301

Dear Mike:

You have requested a brief legal memorandum on the legal effect of a mineral severance in a deed from your lessor, Tug Fork Land Company, to Leo J. Signaigo, Jr. dated September 2, 1958, regarding 7.64 acres, 547.7 acres and 455 acres and recorded in McDowell County Deed Book 238 at page 562, and you would like an opinion as to whether or not the deed transferred title of the oil and gas in place to the grantee in addition to the coal in place.

As a preliminary matter, let us consider the exact language of the severance deed in question, which provides as follows:

> "party of the first part does hereby bargain, sell, grant and convey unto the said party of the second part, with covenants of special warranty, all the coal and other minerals and mineral substances in, on and underlying the following tracts or parcels of land:"

There is a succeeding clause in the deed in question which constitutes a further manifestation of the grant-

or's intent where the grantor excepts and reserves the oil and gas and coal in two certain coal seams, the Pocahontas #3 and #4:

> "2. It is excepted and reserved from the operation of this deed:
>
> > "(a) all the oil and gas and all the coal in the Pocahontas #3 and #4 seams in said three tracts of land above described."

It should be noted at the outset that this is a mineral severance deed, not a reservation of minerals in a deed conveying the surface. As a consequence there is no reason why the language of the deed should be construed favorably to the grantor. In fact, the legal presumption favoring the grantee and against the grantor should apply by reason of which the courts should presume that the grantor intended to sell and convey everything which was not clearly and specifically reserved.

Another rule of legal construction would also appear to apply to the deed in question: *Expressio Unius Est Exclusio Alterius*, which in essence means if you state something one way, you cannot in the same document construe the matter differently. This rule or maxim comes to bear since the grantor specifically reserved the oil and gas in the Pocahontas #3 and #4 seams. The courts would therefore be prone to say that only reserving the coal in certain seams or zones, it was the grantor's intent that the title to the oil and gas in other zones pass to the grantee.

There is another distinction to be made in instances where a deed conveys or reserves "minerals" without further explanation and instances where the language in question conveys "the coal and other minerals". In the first instance the majority of the States and the West Virginia Supreme Court generally agree that the word "minerals" includes coal, oil and gas and just about every other substance that can be gotten from under the

surface of the Earth. See Skeen, *West Virginia Oil and Gas Law* § 4.8 (1984).

In the second instance the principle of *Ejusdem Generis* applies as the grantor has first specified a particular mineral (i.e. coal) and then added the words "and other minerals" afterward. This rule of construction, if applicable, provides that the meaning of "and other minerals" is restricted to other minerals of the same class or order as coal, and in a number of decisions in West Virginia and elsewhere, oil and gas have been held to fall within the same class and therefore included within a grant or reservation of "coal and other minerals".

There is one West Virginia Supreme Court decision which would appear almost directly in point, *Jeffrey v. Spruce-Boone Land Co.*, 112 W. Va. 360, 164 S.E. 292, 8 Ga. L.R. 966 (1932). In the deed in that case, the grantor like your lessor, Tug Fork Land Company, conveyed "all the coal and minerals in and to that certain tract of land. . ." Our Supreme Court of Appeals held in that case that the minerals granted were not limited to coal but included all minerals in the land including even a stratum of pulp stone. A copy of this decision is attached for your review as well as other relevant authorities, and a review of these recent decisions indicates that it is still "good law" in West Virginia. See Skeen § 4.9 for a further discussion of this case and decisions involving similar language.

Based upon the law discussed above, it is my opinion that it is *highly probable* that the Courts of this State would follow *Jeffrey v. Spruce-Boone Land Co.* and a later case, *Prindle v. Baker*, 116 W. Va. 48, 178 S.E. 513 (1935) and hold that Tug Fork Land Company conveyed away the title to the oil and natural gas as well as the coal under the subject lands excepting only the oil and gas in the two coal seams which were specifically mentioned.

The only West Virginia case I could find which is in direct conflict with the position that Tug Fork Land Company conveyed away the oil and gas is the case of *Bruen v. Thaxton*, a 1943 decision. I have copied pertinent portions of that decision which are exclosed for your review. You will note that the *Bruen v. Thaxton* case can be distinguished on several points:

(1) It was a mineral reservation involved rather than a mineral conveyance as in the present situation and in such instances there is a strong persumption against the grantor. Applying that presumption in *Bruen v. Thaxton*, the Court found that the reserving party who reserved the coal and other minerals did not intend to reserve the oil and gas.

(2) The second distinction which can be drawn is the particular language of that reservation and evidence of the intent of the parties.

If you have further questions concerning any of the above, please advise.

Very truly yours,

/s/ Larry L. Skeen
LARRY L. SKEEN

LLS/bjr

P.S. Since dictating the above letter I have spoken with my brother and he indicates that after the conveyance from Tug Fork Land Company, Tug Fork no longer was assessed or taxed with any interest in the oil, gas or coal, which is further evidence of their intent to convey the oil and gas with the coal.

APPENDIX E

PLAINTIFF'S EXHIBIT NO. 13

LAW OFFICES OF
COLEMAN & WALLACE
11 North Kanawha Street
Buckhannon, West Virginia 26201

December 10, 1987

Mr. Larry L. Skeen
Skeen and Skeen
P.O. Box 66
Ripley, WV 25271

RE: Tug Fork Land Company deed to
Leo J. Signaigo, Jr. (DB 238, page 562)

Dear Mr. Skeen:

I have reviewed the above referenced deed as well as other subsequent deeds and leases in the chain of title for the oil and gas underlying the involved 1,002.74 acre tracts in McDowell County, West Virginia.

It is my opinion that the Tug Fork deed is ambiguous on its face and raises serious questions as to the ownership of the oil and gas underlying this tract. If I were abstracting or reviewing this title for an oil and gas producer, I would recommend strongly that no drilling operations be commenced until one of the following courses of action be pursued:

(1) A declaratory judgment action be instituted in the Circuit Court of McDowell County to determine ownership of the oil and gas, with all parties having a possible royalty or overriding royalty interest (or leasehold interest) being named as parties;

(2) Leases be obtained from *both* Tug Fork Land Company and Virginia Crews Coal Company and an interpleader action be instituted in the Circuit Court of McDowell County to determine the proper party to whom to pay royalties. (It is my understanding that you hold a lease from Tug Fork by assignment);

(3) Obtain, if possible, a deed from Virginia Crews Coal Company. Although not required, in my opinion, under West Virginia law, I would recommend to my producer that they offer to sell any rights acquired under the deed to Tug Fork or our assignor under the Tug Fork lease for our costs, including consideration, attorney fees, landman costs and expenses and other necessary expenses, in obtaining the deed. If Tug Fork or our assignor under the Tug Fork lease declined to accept the offer, then I would consider that we were thereafter in an adverse position as to ownership and I would recommend instituting a declaratory judgment action to determine if Tug Fork or my producer had the superior title.

Frankly, I would not certify that Tug Fork reserved title to the oil and gas in its deed to Leo J. Signaigo, Jr. This deed on its face purports to convey "*all* the coal and *other* minerals and mineral substances. . . ." I would interpret this granting clause as conveying all of the oil and gas and would treat the deed as a conveyance of the oil and gas unless other provisions of the deed would indicate otherwise.

As to other provisions in the deed, Paragraph 2(a), page 3, contains an excetpion and reservation of "all the oil and gas and all the coal in the Pocahontas No. 3 and No. 4 seams. . . ." This clearly is a reservation and exception only of the so-called coalbed gas in these two coal seams and hardly could be interpreted as a reservation of all the oil and gas underlying the involved tracts.

Paragraph 6, page 5, of the deed, in my opinion, gives Tug Fork its only hope of establishing title to all of the

oil and gas. As you know, this paragraph excepts and reserves specifically, rights to mine and remove all of the Pocahontas No. 3 and No. 4 seams of coal and then recites, "together with the right to bore for and remove *all the oil and gas underlying said tracts. . . .*", with further provision that such rights are to be used in common with the grantee and so as to interfere as little as possible with mining operations of the grantee. This provision, in my opinion, raises serious questions as to whether or not Tug Fork intended to convey (a) all of the oil and gas except for the two coalbed seams of oil and gas; or (b) intended to convey only the two coalbed seams of oil and gas. Frankly, the former interpretation seems to be the most logical as if the second interpretation were intended, it would seem to me that the grantor would have *specifically conveyed* only the two coalbed seams of oil and gas. I find it hard to accept the premise that the grantor would have bothered to reserve and except specifically the coalbed oil and gas if its intentions were not to convey any of the oil and gas in the first place. In any event, it would appear absolutely foolhardy for a producer to risk the large capital investment required in drilling and equipping a well without clarifying this title question.

It is my understanding that Tug Fork was not assessed for oil and gas following the Signaigo deed. This fact also causes serious problems for me as it could be interpreted as showing an intent not to reserve all of the oil and gas if the deed is held to be ambiguous on its face and extrinsic evidence is permitted to help resolve the ambiguity.

In summary, I would view these matters as constituting a most serious title defect or cloud on title. If abstracting this title, I would not certify the title. If reviewing the title as an in-house attorney, I would not permit drilling to commence without taking some course of action as outlined herein.

For your information, I am a 1955 graduate of the WVU College of Law. I have practiced in a law partner-

ship (Coleman and Wallace) at Buckhannon, since December of 1958. My practice has been a general practice of law, with heavy emphasis on mineral law (coal, oil and gas). Since 1980, I have maintained my private law practice as well as working in-house as General Counsel or Assistant General Counsel of Union Drilling, Inc., a drilling contractor and oil and gas producer at Buckhannon. In the course of my practice, I have abstracted literally thousands of oil and gas titles for Union and numerous other oil and gas developers. I also have reviewed numerous title abstracts prepared by other attorneys and have been responsible for making the determination as to how to resolve title defects and whether or not to authorize drilling.

On many occasions, I have myself actually instituted or recommended the institution of declaratory judgment or interpleader actions to determine ownership or remove clouds on title. I consider this to be an acceptable and preferred alternative in doubtful cases to proceeding with drilling and running the risk of being divested of title and possibly subjecting my clients to treable (sic) damage judgments. In my opinion, this is the standard method of proceeding not only in a mineral transaction but in any real estate transaction where a potential title dispute exists.

If I can be of further help to you, please advise.

Sincerely,

/s/ Robert J. Wallace
ROBERT J. WALLACE

RJW:mdw
1R/2